No. 17-71	
Title:	**Weyerhaeuser Company, Petitioner** **v.** **United States Fish and Wildlife Service, et al.**
Docketed:	July 13, 2017
Linked with 16A916, 18A52, 18A58	
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Numbers:	(14-31008)
Decision Date:	June 30, 2016
Rehearing Denied:	February 13, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 21 2017	Application (16A916) to extend the time to file a petition for a writ of certiorari from May 14, 2017 to June 29, 2017, submitted to Justice Thomas.
Mar 27 2017	Application (16A916) granted by Justice Thomas extending the time to file until June 29, 2017.
Jun 06 2017	Application (16A916) to extend further the time from June 29, 2017 to July 13, 2017, submitted to Justice Thomas.
Jun 09 2017	Application (16A916) granted by Justice Thomas extending the time to file until July 13, 2017.
Jul 11 2017	Petition for a writ of certiorari filed. (Response due August 14, 2017)
Jul 18 2017	Consent to the filing of amicus curiae briefs, in support either party or of neither party, received from counsel for petitioner.
Jul 20 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Markle Interests, LLC.
Jul 26 2017	Waiver of right of respondents Markle Interests, LLC; P & F Lumber Co., 2000, LLC; & PF Monroe Properties, LLC to respond filed.

Aug 04 2017	Blanket Consent filed by respondent- intervenors, Center for Biological Diversity and Gulf Restoration Network on 08/10/2017 VIDED
Aug 09 2017	Order extending time to file response to petition to and including September 13, 2017, for all respondents
Aug 09 2017	Brief amicus curiae of St. Tammany Parish filed. VIDED.
Aug 11 2017	Brief amicus curiae of Mountain States Legal Foundation filed. VIDED.
Aug 14 2017	Brief amici curiae of Washington Legal Foundation, et al. filed. VIDED.
Aug 14 2017	Brief amicus curiae of Center for Constitutional Jurisprudence filed. VIDED.
Aug 14 2017	Brief amicus curiae of Chamber of Commerce of the United States of America filed. VIDED.
Aug 14 2017	Brief amicus curiae of Energy and Wildlife Action Coalition filed.
Aug 14 2017	Brief amici curiae of The American Farm Bureau Federation, et al. filed.
Aug 14 2017	Brief amicus curiae of San Jaun County, Utah filed. VIDED.
Aug 14 2017	Brief amicus curiae of Southeastern Legal Foundation filed. VIDED.
Aug 14 2017	Brief amici curiae of The National Association of Home Builders, et al. filed. VIDED.
Aug 14 2017	Brief amicus curiae of The Cato Institute filed. VIDED.
Aug 14 2017	Brief amici curiae of Alabama and 17 Additional States filed. VIDED.
Sep 07 2017	Order further extending time to file response to petition to and including October 13, 2017.
Oct 06 2017	Order further extending time to file response to petition to and including November 13, 2017, for all respondents.
Nov 13 2017	Brief of intervenor-respondents Center for Biological Diversity and Gulf Restoration Network in opposition filed. VIDED **Main Document** **Certificate of Word Count** **Proof of Service**

Nov 13 2017	Brief of respondents Fish and Wildlife Service, et al. in opposition filed. VIDED. **Proof of Service** **Main Document**
Nov 29 2017	DISTRIBUTED for Conference of 1/5/2018.
Nov 29 2017	Reply of petitioner Weyerhaeuser Co. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 08 2018	DISTRIBUTED for Conference of 1/12/2018.
Jan 16 2018	DISTRIBUTED for Conference of 1/19/2018.
Jan 22 2018	Petition GRANTED.
Jan 29 2018	Motion for an extension of time filed. **Main Document**
Jan 29 2018	Blanket Consent filed by Respondent, United States Fish and Wildlife Service, et al. **Blanket Consent**
Jan 30 2018	Blanket Consent filed by Petitioner, Weyerhaeuser Company. **Blanket Consent**
Jan 30 2018	Blanket Consent filed by Respondent, Intervenor-respondents Center for Biological Diversity and Gulf Restoration Network **Blanket Consent**
Feb 01 2018	Blanket Consent filed by Respondents, Markle Interests, LLC, et al.. **Blanket Consent**
Feb 02 2018	Motion to extend the time to file the joint appendix and petitioner's brief on the merits granted and the time is extended to and including April 23, 2018.
Apr 23 2018	Brief of respondents Markle Interests, LLC, et al. in support of petitioner filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 23 2018	Brief of petitioner Weyerhaeuser Company filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 23 2018	Joint appendix filed (statement of cost filed). **Main Document** **Proof of Service**
Apr 26 2018	Brief amici curiae of Coalition for a Sustainable Delta, et al. filed.

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Apr 27 2018	Brief amicus curiae of Southeastern Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 27 2018	Brief amicus curiae of St. Tammany Parish Government filed. **Main Document** **Proof of Service** **Certificate of Word Count** **Other**
Apr 27 2018	Brief amici curiae of Wyoming Stock Growers Association, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 27 2018	Brief amicus curiae of Center for Constitutional Jurisprudence filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 30 2018	Brief amicus curiae of Cause of Action Institute filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Apr 30 2018	Brief amici curiae of National Federation of Independent Business, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 30 2018	Brief amicus curiae of San Jaun County, Utah filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 30 2018	Brief amici curiae of The American Farm Bureau Federation, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 30 2018	Brief amicus curiae of The Cato Institute filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Apr 30 2018	Brief amicus curiae of Energy and Wildlife Action Coalition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 30 2018	Brief amici curiae of American Exploration & Production Council, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 30 2018	Brief amici curiae of Brief of Alabama and 19 Additional States filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 30 2018	Brief amici curiae of Building Industry Legal Defense Foundation, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Apr 30 2018	Brief amici curiae of The National Association of Home Builders, et al. filed. **Proof of Service** **Certificate of Word Count** **Main Document**

Apr 30 2018	Brief amicus curiae of Chamber of Commerce of the United States of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 30 2018	Brief amici curiae of National Conference of State Legislatures, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Apr 30 2018	Brief amici curiae of Washington Legal Foundation, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
May 02 2018	Motion for an extension of time to file respondents' briefs on the merits filed. **Main Document**
May 04 2018	Motion to extend the time to file respondents' briefs on the merits granted and the time is extended to and including June 29, 2018.
Jun 29 2018	Brief of Intervenor-respondents Center for Biological Diversity and Gulf Restoration Network filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 29 2018	Brief of respondents United States Fish and Wildlife Service, et al. filed. **Proof of Service** **Main Document**
Jul 03 2018	Brief amici curiae of Landowners filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 03 2018	Brief amici curiae of The Evangelical Environmental Network, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 03 2018	Brief amici curiae of Environmental Law Professors filed. **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Jul 05 2018	Brief amici curiae of Scientists filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jul 05 2018	Brief amici curiae of Economists and Law Professors filed. **Proof of Service** **Main Document** **Other** **Certificate of Word Count**
Jul 06 2018	Brief amici curiae of Defenders of Wildlife, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 06 2018	Brief amici curiae of Former Department of the Interior Officials filed. **Main Document** **Proof of Service** **Certificate of Word Count**

Jul 06 2018	Motion of respondents Markle Interests, LLC, et al. in support of petitioner for divided argument filed. **Main Document** **Proof of Service**
Jul 06 2018	Brief amici curiae of Gopher Frog Experts filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 06 2018	Brief amicus curiae of Institute for Policy Integrity at New York University School of Law filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 06 2018	Brief amici curiae of Small Business Owners filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 09 2018	SET FOR ARGUMENT on Monday, October 1, 2018.
Jul 09 2018	Opposition of petitioner Weyerhaeuser Company to motion for divided argument of respondents Markle Interests, LLC, et al. in support of petitioner filed. **Main Document** **Proof of Service**
Jul 10 2018	Motion of Weyerhaeuser Company for an extension of time not accepted for filing. (July 13, 2018 - Resubmitted as an application.)
Jul 11 2018	Application (18A52) of petitioner to extend the time to file a reply brief on the merits from July 30, 2018 to August 13, 2018, submitted to Justice Alito. **Main Document** **Proof of Service**
Jul 13 2018	Application (18A52) granted by Justice Alito extending the time to file petitioner's reply brief on the merits until August 13, 2018.
Jul 16 2018	Motion of Markle Interests, LLC, et al. for an extension of time not accepted for filing. (July 16, 2018 - Resubmitted as an application)
Jul 16 2018	Application (18A58) of respondents Markle Interests, LLC, et al. to extend the time to file a reply brief on the merits from July 30, 2018 to August 13, 2018, submitted to Justice Alito. **Main Document** **Proof of Service**
Jul 17 2018	Application (18A58) granted by Justice Alito extending the time for respondents Markle Interests, LLC, et al. to a file reply brief on the merits until August 13, 2018.
Aug 03 2018	CIRCULATED
Aug 07 2018	Record requested from the U.S.C.A. 5th Circuit.

Aug 08 2018	Record for the U.S.C.A. 5th Circuit is electronic and located on PACER.
Aug 08 2018	Letter from the Solicitor General dated August 8, 2018 filed. (Circulated) **Main Document**
Aug 13 2018	Reply of respondent Markle Interests, LLC, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 13 2018	Reply of petitioner Weyerhaeuser Company filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 24 2018	Motion for divided argument filed by respondents Markle Interests, LLC, et al. DENIED.
Sep 07 2018	Record received from the U.S. Fish and Wildlife Service, the record is electric.
Sep 14 2018	Record received from the U.S.D.C. Eastern Dist. of Louisiana. The record contained 1 box of 6 volumes of records and one volume of transcripts. Also received is on CD of manual attachment to document #60, the contents of the CD is electronic.
Oct 01 2018	Argued. For petitioner: Timothy S. Bishop, Chicago, Ill. For respondents: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C.
Oct 25 2018	Notice of Change of Address of Markle Interests, LLC, et al. not accepted for filing. (Document not of the type that is to be filed electronically – October 31, 2018)
Nov 27 2018	Judgment VACATED and case REMANDED. Roberts, C. J., delivered the opinion of the Court, in which all other Members joined, except Kavanaugh, J., who took no part in the consideration or decision of the case.

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RECORD AND BRIEFS

17-71

No.

FILED
JUL 11 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Endangered Species Act to conserve "ecosystems upon which endangered species * * * depend." 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). "Critical habitat" may include areas "occupied by the species," as well as "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost $34 million in lost development value of the tract. But it found that this cost is not disproportionate to "biological" benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner Weyerhaeuser Company, plaintiffs-appellants below, respondents here, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are filing a separate petition for certiorari.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of Interior.

Intervenor-defendants-appellees below, and respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Weyerhaeuser Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

JURISDICTION

The judgment of the district court granting in relevant part the defendants' motions for summary judgment was entered on August 22, 2014. RE100, Dkt. 130.[1] Weyerhaeuser Company ("Weyerhaeuser") timely appealed. RE49-50, Dkt. 133. The judgment of the court of appeals was entered on June 30, 2016. The court of appeals' order denying the petition for rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. No. 16A916 (Mar. 27 & June 9, 2017). Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* ("ESA"), are reproduced at Pet. App. 163a-165a. U.S. Fish and Wildlife Service ("FWS") regulations describing the "criteria for

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[1] The Record Excerpts of the Appellants filed in the Court of Appeals are cited as "RE."

designating critical habitat" that applied in this case appear at 50 C.F.R. § 424.12 (2011) and are reproduced at Pet. App. 166a-169a. The final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012).

STATEMENT

The endangered dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. at 35131.

First, for breeding, it needs small isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds to serve as non-breeding habitat. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." *Ibid.*

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and the "abundant native herbaceous species" of groundcover produced by frequent fires. *Ibid.*

These three "primary constituent elements" ("PCEs") of frog habitat are each essential to "support the life-history processes of the species." *Ibid.* If one is missing, the frog will not survive.

Respondent FWS designated as critical habitat for the dusky gopher frog areas of Mississippi occupied by the frog and other areas that the frog does not occupy but which have each of these three features. In addition—and at issue here—FWS designated 1544 acres of private forestry land in Louisiana. *Id.* at 35135.

There is no dispute that this Louisiana property ("Unit 1") is not occupied by the frog. *Ibid.* ("the last

observation of a dusky gopher frog in Louisiana was in 1965"). There also is no dispute that Unit 1 has at best one of the features necessary for frog habitat—ephemeral ponds. FWS recognized that "uplands associated with th[ose] ponds do not currently contain the essential physical or biological features of critical habitat." *Ibid.* To the contrary, Unit 1 contains a "closed-canopy forest" of loblolly pines that is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35129. And Unit 1's management does not "includ[e the] frequent fires" necessary to "support a diverse ground cover of herbaceous plants" in "the uplands and in the breeding ponds." *Ibid.* In other words, "Unit 1 is uninhabitable" by the frog barring a radical change in the land's use by its private owners. Pet. App. 129a; see 77 Fed. Reg. at 35132.

The problem with FWS's designation of Unit 1 as critical habitat for the dusky gopher frog is that the ESA does not authorize it. That is so for two independent reasons. First, the only land FWS is statutorily authorized to designate is "*any habitat* of [an endangered species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review explained, that plain statutory language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be "a place where the species" could "naturally live or grow." Pet. App. 132a, 142a. Unit 1 does not fit that description.

Second, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation of the species*." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no plausible reading of that phrase that includes areas that are uninhabitable by the species. The Fifth Circuit's ruling offends that

plain statutory language and perversely makes it easier to designate unoccupied areas than occupied areas, in conflict with decisions of other circuits and Congress's intent. See, *e.g.*, *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); H.R. Rep. No. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468 (FWS "should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species").

The cost of FWS's vast expansion of federal power over private land is enormous. If the ponds on Unit 1 are jurisdictional under the Clean Water Act ("CWA"), any proposed change in the use of the land that requires a CWA permit will trigger an ESA Section 7 consultation with FWS. 77 Fed. Reg. 35140-35141. That means that any CWA permit would be conditioned on the landowners complying with FWS demands to create a preserve for the frog—or would be denied altogether if "the Service recommends that no development occur within the unit." *Id.* at 35141. FWS's own economic analysis estimated that the resulting lost development opportunities could cost the landowners $34 million. *Id.* at 35141. Multiplied for the 2000+ animals and plants listed as endangered or threatened, FWS's expansion of its powers imposes a multi-billion dollar drain on our economy.

FWS's misinterpretation of the ESA undermines our federal system of government. It substitutes federal agency authority over vast tracts of private land for the "quintessential state and local power" over "[r]egulation of land use." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006). No "'clear and manifest' statement from Congress" authorizes that "unprecedented intrusion into traditional state authority."

Ibid. That is why fifteen States, including Louisiana, urged en banc review in this case to "protec[t] the private property rights of citizens and the sovereign interests of the States." Br. Am. Curiae of Alabama, *et al.*, in Support of Rhg. En Banc, at 1 (Aug. 9, 2016). FWS's interpretation furthermore "invokes the outer limits of Congress' power" over interstate commerce. *Solid Waste Agency of N. Cook Cty.* v. *Army Corps*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). This Court reads "statute[s] as written to avoid [such] significant constitutional and federalism questions"—which here calls for rejection of FWS's expansive interpretation of its powers. *Id.* at 174.

The en banc dissenters recognized "the importance of further review" of the Fifth Circuit's erroneous decision, which garnered only bare panel and full court majorities. Pet. App. 162a. This Court should intervene now to ensure that the majority's "non-textual interpretations" of the ESA do not abrogate "Congress's efforts to prescribe limits on the designation of [critical habitat]." *Ibid.*

A. The Statutory and Regulatory Scheme

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). Section 7, 16 U.S.C. § 1536(a)(2), "further requires each federal agency to 'insure that any action authorized, funded, or carried out by such agency'" is not likely to "'result in the destruction or adverse modification of [critical] habitat.'" *Id.* at 158.

If an agency finds that proposed federal action may have an adverse effect on critical habitat, "it must engage in formal consultation with [FWS]," which then

"provide[s] the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Def. of Wildlife*, 551 U.S. 644, 652 (2007).

The Section 7 consultation requirement means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits," adversely affect critical habitat. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). Accordingly, the Act's requirements apply to any proposed use of private land for which a federal permit is required, such as a permit to discharge fill material into wetlands under Section 404 of the CWA, 33 U.S.C. § 1344.

B. The ESA's Critical Habitat Provisions

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation provision. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

Five years later, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would

"result in total destruction of the snail darter's habitat," the statute required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

The Tellico Dam litigation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13, 1978 U.S.C.C.A.N. at 9463. Congress responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, 1978 U.S.C.C.A.N. at 9475.

As amended, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The 1978 amendments also provided that except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." *Id.* § 1532(5)(C).

Explaining these amendments, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, 1978 U.S.C.C.A.N. at 9468. Representative Murphy, a sponsor, confirmed that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 1221 (Comm. Print 1982) ("LEG. HIST.").

At the time FWS designated critical habitat for the dusky gopher frog, its regulations provided that it "may designate as critical *occupied* habitat" areas "that contain certain physical or biological features called 'primary constituent elements,' or 'PCEs,'" such as space for normal behavior, nutritional or physiological requirements, breeding sites, and shelter. Pet. App. 83a (quoting 50 C.F.R. § 424.12(b) (2012)).

FWS regulations provided that the agency could "designate as critical *unoccupied* habitat" areas outside the geographical areas occupied by the species if it determined the habitat "'is essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" Pet. App. 83a (quoting 16 U.S.C. § 1532(5)(A)(ii) and 50 C.F.R. § 424.12(e)).[2]

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[2] Citing this case, FWS amended its regulations in 2016 to align with the designation criteria it applied to dusky gopher frog habitat. 81 Fed. Reg. 7439 (Feb. 11, 2016). See Part II.B, *infra*.

C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

The dusky gopher frog "is a terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. It spends most of its life "underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.* (quoting 77 Fed. Reg. at 35129-35131). Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 85a n.7 (quoting 77 Fed. Reg. at 35130).

FWS designated the dusky gopher frog as endangered in 2001, but did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

1. FWS's final designation. FWS identified three habitat elements essential to the conservation of the frog: ephemeral wetlands for breeding; upland forest for non-breeding habitat; and upland areas connecting the two. 77 Fed. Reg. at 35131. Essential to all three are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*

FWS conceded that the dusky gopher frog is currently known to occur only in Mississippi. *Id.* at 35120. It nevertheless designated as critical habitat 1544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1, where the frog "had not been seen * * * since the 1960s" and which is 50 miles

from where the frog now lives. Pet. App. 86a; see 77 Fed. Reg. at 35146 (map).

FWS designated Unit 1 because it contains isolated ponds "into which dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. at 35135. FWS acknowledged that apart from these ponds Unit 1 does not contain the necessary elements for frog habitat: its uplands "do not currently contain the essential physical or biological features of critical habitat." *Ibid.*; see *id.* at 35129 (Unit 1 is "a closed-canopy forest unsuitable as habitat for dusky gopher frogs"). But FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." *Id.* at 35123. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129), FWS deemed Unit 1's designation "essential for the conservation of the species" because with all those changes it could provide habitat for population expansion. *Id.* at 35135.[3]

2. FWS's economic analysis. ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion

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[3] After years of study FWS initially proposed a designation that did not include Unit 1, only Mississippi sites. 75 Fed. Reg. 31387 (June 3, 2010). In response to comments, FWS later added Unit 1 "as a future site for frog reestablishment," though "it only contains one primary constituent element" of frog habitat, to address the "risk of extirpation and extinction from stochastic events" (76 Fed. Reg. 59774, 59780 (Sept. 27, 2011))—*i.e.*, as a "backup" site to those in Mississippi.

outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Petitioner Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. RE 108. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners, including Weyerhaeuser, undertook comprehensive joint planning for future development, obtaining zoning changes and local approvals. RE 108-109. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, at 4-3 ¶ 73 (Apr. 6, 2012) ("Final Econ. Analysis").[4]

FWS recognized that designation of Unit 1 could interfere with the planned development. If the ponds fall within CWA jurisdiction, that would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions. FWS calculated that permit

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[4] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "large warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 per cent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis at 4-2 ¶ 71. The Parish Council opposed the designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).

conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value. If development were prohibited altogether, the loss would be $33.9 million. RE 119-120; 77 Fed. Reg. at 35140-35141. This "reduction in land value occurs immediately at the time of designation." RE 120.

FWS recognized that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. at 35141; RE 121-123. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Id.* at 35141. Notably, however, even if CWA permits were denied, "the Government is aware that Unit 1 cannot be used for the conservation of the [frog] because someone" would "have to significantly modify Unit 1 to make it suitable for frog habitat" and the "only evidence in the record is that the owners do not plan to do so." Pet. App. 76a-77a (Owen, J., dissenting).

D. The District Court Decision

The landowners brought Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, on cross-motions for summary judgment the court "[r]eluctantly" upheld the designation against challenges that it violated the ESA because "Unit 1 does not meet the statutory definition of 'critical habitat'"; that it was arbitrary and capricious because "FWS unreasonably determined

that Unit 1 is 'essential' for conservation of the frog"; and that FWS's economic analysis was flawed. *Id.* at 102a-103a.

E. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote. The majority undertook an "extremely limited and highly deferential" review. Pet. App. 6a. It rejected the landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply to that decision, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented from this "unprecedented and sweeping" holding that "re-writes the Endangered Species Act." Pet. App. 50a, 65a. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." *Id.* at 60a.

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have granted review because "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id.* at 126a.

The dissenters would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." *Id.* at 142a. Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. *Id.* at 142a-150a. Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." *Id.* at 155a. Finally, the dissenters explained that the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*, *supra*. Pet. App. 156a-162a. These errors, the dissenters urged, underline "the importance of further review." *Id.* at 162a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.

As a matter of law, Unit 1 is not critical habitat of the dusky gopher frog. The frog does not live there, cannot live there, and will not live there in the future. The ESA prohibits designation of uninhabitable, unoccupied land as critical habitat.

A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

1. The panel majority's interpretation of the critical habitat provisions contravened the plain language of the ESA. The panel held that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. But, properly interpreted, "the ESA contains a clear habitability requirement." *Id.* at 131a (Jones, J.).

ESA Section 4 requires FWS to "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This phrasing means that "critical habitat" "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J.). The "irreducible minimum" of critical habitat "is that it *be habitat*." *Id.* at 137a.[5]

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[5] Weyerhaeuser preserved this argument. It told the district court that "there is no conceivable logic under which Unit 1 can be considered 'habitat.'" Weyerhaeuser Mem. in Support of Mot. for Summ. Judgment 14, D. Ct. Dkt 67-1 ((Dec. 9, 2013). Weyerhaeuser explained that for unoccupied areas, "the separate statutory * * * requirement that designated areas be 'habitat' in the first instance is not obviated": Congress "made clear in § 1533(a)(3)(A)(i) that the Secretary may only designate any 'habitat' as critical habitat." Weyerhaeuser Reply and Memo. in Opp. to Defs' Mot. for Summ. Judgment 12, D. Ct. Dkt 106 (May 2, 2014). The district court rejected a "habitat" requirement without addressing Section 1533(a). Pet. App. 106a-108a.

The Fifth Circuit likewise rejected Weyerhaeuser's argument that the FWS "'exceeded its statutory authority'" when it designated Unit 1 though it "is not currently habitable by the frog." Pet. App. 21a, 23a. The dissenters from the denial of en banc review, by contrast, would have held that "a species' critical habitat must be a subset of the species' habitat." *Id.* at 131a. Accordingly, the question whether the "habitat" requirement of Section 1533(a) must be satisfied before unoccupied critical habitat may be designated was presented and decided below and

That straightforward textual reading prohibits designation of Unit 1 as critical habitat for the dusky gopher frog. "Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961); see AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987) ("the kind of place that is natural for the life and growth of an organism").

Unit 1 is not "habitat" because it lacks at least two of the three features necessary for the frog's survival. This fact is "undisputed." Pet. App. 49a (Owen, J.); see *id.* at 131a (Jones, J.). FWS admitted that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. at 35129. FWS found that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." *Id.* at 35135. And FWS admitted that "manag[ing]" Unit 1 to *create* habitat and "translocat[ing]" the frog to Unit 1 "cannot be implemented without the cooperation and permission of the landowner," which is "voluntary." *Id.* at 35123.

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is preserved for this Court's review. See Pet. App. 139a ("Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented" and "anything but inadequate"); Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 466 (10th ed. 2013).

Given those undisputed facts, Unit 1 is not critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute." Pet. App. 138a (Jones, J.).

2. The panel's ruling violated the ESA's definition of critical habitat for other reasons too. ESA Section 3 defines critical habitat to mean "occupied" land that contains "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and unoccupied "areas" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A).

There is no dispute that, if the frog *occupied* Unit 1, Unit 1 *could not* be designated as critical habitat because it lacks the "physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). In ruling that FWS properly designated Unit 1 as unoccupied critical habitat, the Fifth Circuit made it *easier* to designate unoccupied, uninhabitable land as critical habitat than occupied land. A correct interpretation of the statute would have "confirm[ed] the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

The statutory phrase "areas [that] are essential for the conservation of the species" cannot reasonably be read to extend to areas in which a species *cannot* survive, either now or in the foreseeable future. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable").

Those definitions do not cover Unit 1, which "plays no part in the conservation" of the frog (Pet. App. 48a (Owen, J.)), "will not support" the frog (*ibid.*), and is "distant" from where the frog actually lives. 77 Fed. Reg. at 35124. As 15 States explained in supporting the landowners' en banc petition, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator." Am. Br. of Ala., *et al.*, in Support of Rh'g En Banc at 3. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Fifth Circuit erroneously upheld a designation that is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *N.R.D.C.*, 467 U.S. 837, 843 (1984).

3. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. But the Fifth Circuit's ruling is at odds with the "[s]urrounding provisions" and "structure" of the ESA. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

ESA Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 15 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4, Section 7 is

unambiguous that *critical* habitat must be *habitat*. The Fifth Circuit severed the link between those concepts, in violation of both ESA Section 4 and Section 7.

The Fifth Circuit's ruling also clashes with the remainder of ESA Section 3's definition of critical habitat. Section 3 provides that, generally, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). That provision shows that Congress envisioned critical habitat to be *at most coextensive* with, and almost always *narrower* than, the area that "can be occupied" by the listed species. The Fifth Circuit's ruling allows FWS to designate critical habitat *beyond* the area "which can be occupied by" the listed species, as here, and thereby contradicts statutory text and Congress's intent.

Other provisions of the ESA confirm that Congress understood "critical habitat" to mean areas occupied by a listed species plus a narrow category of unoccupied areas that contain the habitat a species needs and that are "essential" to the species' survival. For example, ESA Section 4 requires that FWS periodically publish lists that identify "over what portion of its range" a listed species "is endangered or threatened, and specify any critical habitat *within such range*." 16 U.S.C. § 1533(c)(1) (emphasis added). But Unit 1 does not lie "within" the dusky gopher frog's "range." See RANDOM HOUSE DICTIONARY, *supra* ("range" is "the region over which a population or species is distributed"); AMERICAN HERITAGE DICTIONARY, *supra* ("[t]he geographical region in which a kind of plant or animal normally lives or grows"); 13 THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[t]he geographical area over which a certain plant or animal is distributed"). Indeed, FWS designates unoccupied land as critical habitat only when it determines that "a designation

limited to [a species'] range would be inadequate." 77 Fed. Reg. at 35128. FWS points to the "historical" range of species (*e.g.*, 76 Fed. Reg. at 59780), but that term appears nowhere in the ESA, which talks only about a species' "range." 16 U.S.C. §§ 1532(6), 1533(a)(1)(A), 1533(c)(1). FWS's position contradicts the plain language of the statute.[6]

Finally, ESA Section 5 authorizes the Secretary of the Interior to conserve listed species by acquiring "lands, waters, or interest therein." 16 U.S.C. § 1534. That power is not limited to "habitat" or lands "essential" to species survival. As this Court pointed out in *Sweet Home*, "the Section 5 authority" is well suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species." 515 U.S. at 703. If FWS wants to turn non-habitat into habitat and translocate the frog there, Section 5 provides the appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners.

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the dissent's approach.

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[6] Other provisions confirm that Congress did not envisage designation of unoccupied, uninhabitable areas. Section 4 instructs FWS to give notice of a proposed designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States with cooperative agreements, based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

4. The ESA's legislative history bolsters this conclusion. In the 1978 amendments that defined critical habitat for the first time, Congress sought to "narro[w] the scope of the term" because it was concerned that a broad definition could result in "designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, 1978 U.S.C.C.A.N. at 9475. Accordingly, Congress enacted an "extremely narrow definition" of critical habitat. LEG. HIST., *supra*, at 1221.

The Fifth Circuit's interpretation, however, is extremely broad. It allows FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25. And it saddles landowners with the nearly insurmountable burden of proving that FWS's factual findings are "implausible." Pet. App. 24a. "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's [essentiality] decisions." Pet. App. 155a (Jones, J.). The Fifth Circuit's ruling "is the opposite of what Congress declared" when it enacted the critical habitat provisions. *Id.* at 149a; see also *id.* at 137a n.4 (the legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species habitat").

5. "[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

First, FWS's designation tests the boundaries of the Commerce Clause. "The Commerce Clause

empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and "spend most of their lives underground" except when traveling to and from ephemeral ponds to breed. 77 Fed. Reg. at 35129. FWS found no commercial value in the frogs or in the designation of the frogs' critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. at 35127. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

The lack of a commerce connection is exacerbated when it comes to Unit 1. Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

Second, FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision "signals a huge potential expansion of [FWS's] power effectively to regulate

privately- or State-owned land." Pet. App. 143a (Jones, J.). Here, FWS acknowledged, St. Tammany Parish has rezoned Unit 1 to accommodate residential, commercial, civic, and open space uses that will serve the needs of this fast-growing community into the future. *Final Econ. Analysis*, *supra*, at 4-2 to 4-3. But FWS's designation—through the CWA permitting process—would turn all or most of the land into a dusky gopher frog preserve, requiring the owners to "conduc[t] forestry management using prescribed burning," "maintain an open canopied forest with abundant herbaceous ground cover," and in numerous other ways create new habitat for imported frogs. 77 Fed. Reg. at 35132.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (plurality). But "[r]ather than expressing a desire to readjust the federal-state balance" (*SWANCC*, 531 U.S. at 174), the ESA declares that it is "the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2))—precisely what is involved here because CWA protection of ponds and wetlands is the sole basis for FWS to require the landowners to manage Unit 1 to create frog habitat. That policy is the *exact opposite* of a clear and manifest statement directing FWS to usurp States' traditional authority to regulate land use.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied, non-essential, non-habitat as "critical habitat." *SWANCC*, 531 U.S. at 174.

B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that, while *occupied* critical habitat must "contai[n] 'those physical or biological features * * * essential to the conservation of the species,'" *unoccupied* critical habitat need not do so. Pet. App. 15a, 23a. The Fifth Circuit thus "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). That "remarkable and counterintuitive reading" conflicts with decisions of the Ninth Circuit, which "has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat." *Id.* at 143a, 147a.

In *Arizona Cattle Growers' Association* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), the Ninth Circuit held that the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas." The plaintiff argued that, in designating critical habitat for the Mexican Spotted Owl, "FWS treated unoccupied areas as occupied to avoid this more onerous process." *Ibid.* After reviewing the administrative record, the Ninth Circuit concluded that FWS reasonably determined that the owl in fact occupied the designated areas. *Id.* at 1167-1171. That analysis would have been unnecessary under the Fifth Circuit's ruling, which imposes a *lower* standard on the designation of unoccupied critical habitat.

In *Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Services*, 616 F.3d 983, 990 (9th Cir. 2010), plaintiff argued that FWS conflated occupied and unoccupied critical habitat when it designated vernal pool complexes as critical habitat for various species. The Ninth Circuit held that

the challenge failed because FWS's designation satisfied "the standard for unoccupied habitat," which is "more demanding" than the standard for "occupied critical habitat." *Ibid.* That holding leaves no doubt that the Ninth Circuit views the standard for unoccupied critical habitat as more stringent than the standard for occupied critical habitat.

The Fifth Circuit's ruling also conflicts with numerous district court decisions holding that the standard for unoccupied critical habitat is more demanding than that of occupied critical habitat. See, *e.g.*, *Am. Forest Res. Council* v. *Ashe*, 946 F.Supp.2d 1, 44 (D.D.C. 2013) ("more demanding standard for unoccupied habitat"), aff'd, 601 F. App'x 1 (D.C. Cir. 2015); *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event that designation of occupied lands"); see also *Ctr. for Biological Diversity* v. *Kelly*, 93 F.Supp.3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied critical habitat"); *All. for Wild Rockies* v. *Lyder*, 728 F.Supp.2d 1126, 1138 (D. Mont. 2010) ("the ESA imposes 'a more onerous procedure on the designation of unoccupied areas'").

In short, the Fifth Circuit's ruling broke sharply from existing judicial interpretations of the ESA's critical habitat provisions. This Court should grant certiorari to restore uniformity among the lower courts.

II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.

1. This case puts into sharp relief the staggering "regulatory burdens and corresponding economic costs" imposed on landowners when FWS designates private land as "critical habitat." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678, 10680 (2013). As the district court observed, FWS's designation of Unit 1 was "remarkably intrusive" and "insensitiv[e] to private property." Pet. App. 103a. FWS and the panel acknowledged that, upon designation, Unit 1's value "immediately" plummeted "given the 'stigma' attached to critical-habitat designations." *Id.* at 13a.

FWS explained that in a Section 7 consultation it might "recommen[d] that no [future] development occur" on Unit 1, and found that doing so would cost Unit 1's landowners $34 million in lost development opportunities. Pet. App. 75 n.84, 117a; 77 Fed. Reg. at 35141. If it allowed development at all, FWS said it could condition a CWA permit on the landowners creating and maintaining frog habitat on 60 per cent of Unit 1, at a cost of $20.4 million. 77 Fed. Reg. at 35141. These estimates ignored additional costs associated with controlled burns, the "negative impacts" of which FWS said it could not quantify. *Id.* at 35126. It excluded too the toll of the Section 7 consultation process, which "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath,

supra, 43 ENVT'L L. REPORTER at 10681. The costs to the landowners of participating in the regulatory proceedings and in this litigation have been significant too. The economic, regulatory, and litigation burdens on Unit 1's landowners have been astounding.

Meanwhile, the designation provides *no benefits* to the frog. As FWS explained, "designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species." 77 Fed. Reg. at 35123. It is "voluntary" for Unit 1's owners whether to create habitat for the frog, as "habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Ibid.* Any benefit to the frog thus hinges on FWS's "hope to work with the landowners." *Ibid.* But "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." Pet. App. 48a (Owen, J.). "[T]he land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that [FWS] concluded would be necessary" to create habitat for the frog. *Id.* at 52a.

The landowners thus face the Catch-22 that they can continue forestry operations on the frogless land largely unhindered by the designation. But if they try to develop the land consistent with their plans and current zoning, the designation may well stop the development in its tracks—which again would not help the frog. Either way, the designation destroys economic activity, leaves the land as unoccupied non-habitat, and does nothing to help the frog.

2. The disconnect between the burden on private landowners and the lack of benefit to the species is nothing new. FWS has long understood that critical habitat designation "provides little additional protection to most listed species," is "driven by litigation rather than biology," and "imposes huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). FWS has "seriously question[ed]" the "utility" of designation and concluded that it "is not an efficient or effective means of securing the conservation of species." 62 Fed. Reg. 39129, 39131 (July 22, 1997).

Scholars likewise have found no evidence "that critical habitat designation promotes species' recoveries or prevents species' declines." Joe Kerkvliet and Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOL. ECON. 499, 508 (2007). To the contrary, designation often perversely "induce[s] habitat destruction" because landowners preemptively destroy habitat to "avoid costly land-use restrictions." Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51 (2003).

At the same time, critical habitat designation increases the costs and reduces the amount of development. See Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67, 67 (2006) (designations decreased housing construction by 37 percent). Here, the unwarranted designation of Unit 1 threatens a substantial commercial and residential development for which local government rezoned the area to serve the needs of the fast-growing St. Tammany Parish population.

This imbalance of costs and benefits is characteristic of the critical habitat program, and made worse by FWS's expansionary zeal to reach unoccupied non-habitat. "The fact that the biologists themselves have found critical habitat of such little utility bespeaks the low tally on the benefits side, and the costs of the provisions are evinced in the delays and resource drain caused by both designation and the frequent litigation that follows." Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961, 998 (2015).

This widely acknowledged gulf between costs and benefits counsels interpreting ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent—that is, narrowly. FWS's expansive construction inflicts severe costs on landowners and affected communities with no countervailing environmental benefit.

3. FWS's approach has no meaningful limit. As Judge Owen explained, "*the linchpin*" of the panel majority's ruling is that "uninhabitable land" may be designated as critical habitat if the land could "be transformed into habitat" and contains "at least one 'physical or biological featur[e] * * * essential to the conservation of the species.'" Pet. App. 63a-64a; see *id.* at 30a n.20 (majority) ("if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog"). Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" Pet. App. 49a.

As Judge Jones understood, the panel's ruling bestows "virtually limitless" authority on FWS given the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting

platforms,' 'forested areas within 0.5 mile'" of "'individual trees with potential nesting platforms,' 'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" Pet. App. 155a (footnotes omitted). Judge Jones cautioned that, "[w]ith no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a.

The panel's "'unprecedented and sweeping'" expansion of FWS power would "encourage aggressive, tenuously based interference with property rights" and with State authority over land use. *Id.* at 156a, 162a. This Court should overturn it now before more damage is done.

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review.

In 2016, FWS revised its regulations to conform to the approach it took in this case. Revised 50 C.F.R. § 424.12 provides that FWS may designate as critical habitat "specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species." 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). FWS explained that unoccupied areas "need not have the features essential to the conservation of the species" to be designated, even though those "physical or biological features" *are* necessary to designate occupied areas. *Id.* at 7420-7421, 7425, 7434. FWS acknowledged—citing the district court's ruling in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Id.* at 7427.

Twenty States challenged the 2016 rule, contending that it is inconsistent with the ESA and arbitrary and capricious. *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala.) (First Amended Complaint filed Feb. 2, 2017, Dkt. 30). No responsive pleadings have been filed and the case is stayed until September 11, 2017, at the government's request. Dkt. 46.

The pendency of that early-stage litigation does not reduce the need for review in this case. The new rule formalizes the same incorrect statutory interpretation with which FWS justified its designation of Unit 1 and which the Fifth Circuit upheld. And while resolution of the rule challenge would have no effect on the erroneous judgment for which review is sought here, this Court's reversal in this case *would* foreordain the result of the rule challenge, because FWS concedes that the rule is "not a change" from the basis on which it designated the landowners' property. 81 Fed. Reg. at 7427.

This case provides the Court with the opportunity to resolve the issues presented in a concrete, particularized context. The features of the designated tract are known and undisputed, which illuminates the dire consequences of FWS's mistaken reading of the ESA. Rather than delay resolution of important questions about a major federal environmental statute for years while the rule challenge proceeds, this Court should resolve them now.

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

FWS must "tak[e] into consideration the economic impact" of a designation and "may exclude any area

from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits" of designation. 16 U.S.C. § 1533(b)(2). FWS purported to take into account the economic impact of designating Unit 1—concluding that designation could cost the landowners up to $34 million but that unquantifiable "biological" benefits meant there were no "disproportionate costs" to justify excluding Unit 1 from designation. 77 Fed. Reg. at 35141. As the dissenters below observed, the "shocking fact" that designation may cost landowners $34 million is matched by the "shocking fact[s]" that "there is virtually nothing on the other side of the economic ledger" and that FWS "never performed a comparison of the relevant costs." Pet. App. 158a-159a.

Petitioner challenged FWS's refusal to exclude Unit 1 from designation on economic grounds as arbitrary and counter to the evidence before the agency. See Pet. App. 159a; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The panel majority refused to consider that challenge on the ground that FWS's determination whether to exclude is discretionary and there are no judicially manageable standards for a reviewing court to apply. Pet. App. 33a.

But the dissenters pointed out that ruling "play[s] havoc with administrative law." Pet. App. 156a (Jones, J.). It flies in the face of the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015). It also flatly "contradict[s this] Court's statement in *Bennett* v. *Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion." Pet. App. 156a-157a; see 520 U.S. at 172. Such review is indispensible: *Bennett* recognized that a "primary" "objective" under the ESA "is to avoid needless economic dislocation produced by agency

officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. If private landowners cannot challenge FWS's cost-benefit analysis, how would that objective ever be achieved?

Abuse of discretion is a familiar standard of review that is administrable by the judiciary. See Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013). Furthermore, the *State Farm* analysis guides review of FWS's weighing of economic benefits. See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (reviewing whether an agency's explanation for its decision is "counter to the evidence" or thoroughly "implausible"). The clash between the panel decision and this Court's precedent on the availability of judicial review suffices to warrant certiorari on petitioner's second question presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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JULY 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

Markle Interests, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C., Plaintiffs–Appellants

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

Weyerhaeuser Company, Plaintiff–Appellant

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

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Cons w/ No. 14-31021

Filed June 30, 2016

Appeals from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges.*

STEPHEN A. HIGGINSON, *Circuit Judge*:

Opinion

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L.C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open-canopied pine forests.[2] They migrate to isolated, ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final

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[1] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi gopher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses

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[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs-Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross-motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of In-*

terior, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen-suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its deci-

> sion that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et. seq.* As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly de-

fines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this

designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether

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agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing.[9] *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)). "Article III of the Constitution limits federal courts' juris-

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[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

diction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development—is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to

Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly speculative fear" that the government would imminently

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so.

target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court—that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of-interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone-of-interests test. We thus

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[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical–Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131.

particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical-habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mis-

sissippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader por-

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generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

tion of the species' historic distribution." *Id.* at 35, 125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35, 124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35, 133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35, 124.

Finally, in addition to ephemeral ponds, dusky gopher frogs also require upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35, 131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35, 134. This value, which was

based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

Altogether, the Service concluded:

> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's deter-

mination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that,

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F.

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meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra note 20.*

Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habit at if these areas are "essential for the conservation of these species." 16 U.S.C. § 1532(5)(A)(ii). The statute de-

fines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designa-

tions, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii), (b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable

arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in ef-

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probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. Although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective.

fect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any

more "necessary" to a given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[19]

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental-take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceiva-

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the situation here, and

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ble that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C. § 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that *in this case*, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. *See, e.g.*, Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them. Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky

the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat desig-

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gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." *See* 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity of Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

nation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . .." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is

arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

> *may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it

is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical-habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . ., which is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit

1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the lim-

its of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in *Michigan*, the ESA explicitly mandates "consideration" of "economic impact." 16 U.S.C. § 1533(b)(2); *see Bennett*, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. *See* Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. *See Bldg. Indus. Ass'n of Bay Area*, 792 F.3d at 1032–34. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The

Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is *intra*state (not *inter*state) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." *Markle Interests*, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." *Id.*

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third *Lopez* prong. *See United States v. Morrison*, 529 U.S. 598, 609–12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." *Id.* at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to instances that "have an explicit connection with or effect on interstate commerce." *Id.* at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. *Id.* at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. *Id.* The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in *Morrison*. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the

"take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff—developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gon-*

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species).

zales v. Raich, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. *See GDF Realty*, 326 F.3d at 639 ("ESA's protection of endangered species is economic in nature."); *id.* at 640 ("ESA is an economic regulatory scheme . . .."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. *See id.* § 1538(a)(1)(E)–(F); *GDF Realty*, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical-habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic ac-

tivity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could

be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 483, 497–98 (4th Cir. 2000); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habi-

tat—one that the Service has already found to be essential for the conservation of the species—to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted)).

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the regula-

tion of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical-habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical-habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . .."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177–78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3 (1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in na-

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect [ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no

ture, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action

under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of-interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact-statement requirement.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

PRISCILLA R. OWEN, *Circuit Judge*, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species"[1] because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3] to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not play any supporting role in the existence of cur-

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] *Id.*

[3] *Id.* § 1531 *et seq.*

rent habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence

of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A).

[6] 77 Fed. Reg. at 35,118.

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then re-

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[10] *Id.* at 35,133.

[11] *Id.* at 35,135.

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . .. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.").

[13] *Id.* (noting "we hope to work with the landowners").

[14] *Id.* at 35,129.

placed with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I)

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[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171–75, (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

> essential to the conservation of the species and (II) which may require special management considerations or protection; and
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> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the en-

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

dangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example, the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.'"[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species.[22] The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is signifi-

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[21] *Ante* at 19.

[22] *Bear Valley*, 790 F.3d at 994.

cantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" to the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24]

In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C. § 203(a) required long-distance communications common carriers to file tariffs with the Federal Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.'"[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long-distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority

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[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

[25] *Id.* at 220.

[26] *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id.* at 220.

was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.'"[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934."[31] The same can be said of the Service's, and the majority opinion's, construction of the Endangered Species Act in the present case. It may be a good idea to permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation " 'goes beyond the meaning that the statute can bear.'"[32] That court was fully

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[28] *Id.* at 228.

[29] *Id.* at 229–31.

[30] *Id.* at 231.

[31] *Id.* at 231–32.

[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995).

cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'"[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges.' This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI Telecommunications Corp.* is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of.'"[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the sci-

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[33] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

[34] *Sw. Bell Corp.*, 43 F.3d at 1521 (quoting *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)).

[35] *Id.*

[36] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[37] *Ante* at 19 n.15 (alteration in original) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)).

entific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be

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[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[ ] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not

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[40] *Ante* at 21.

[41] *Id.*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

when the species will be conserved, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation.

The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species.[42] The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act

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[42] *See ante* at 22.

[43] *Id.*

may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species" requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habi-

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[44] *See ante* at 22 n.17; 24 n.18.

tat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that un-

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[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24.

[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

inhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[ ] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justi-

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[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

fied its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant [physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land

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[51] *Ante* at 24–25.

[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] *See also ante* at 20.

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat, the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than

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[56] *See ante* at 25 n.19.

[57] *Id.*

any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling

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[58] *Id.* (citation omitted).

to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely

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[59] *Id.*

[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the

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[61] *Id.*

[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id.* (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population).

[64] *Ante* at 13–14 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation

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[65] *See* 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . ..").

of the species" is therefore not supported by substantial evidence, and the designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However,

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[66] 77 Fed. Reg. at 35,131.

[67] *Id.*

[68] *Id.*

[69] *Id.*

the Service found that Unit 1 has only one of the three primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed-canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.*; *see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover; (3) maintaining forest underground structure such as gopher tortoise

Service found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact depended on the extent to which it might be devel-

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burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] *Id.* at 35,140.

oped,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur.*"[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species.*"[83] The

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* (emphasis added).

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id.* at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog crit-

Service reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results in devel-

ical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact. *Id.*

[84] *Id.* at 35,140-41:According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate. Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

opment on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable.

Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to

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[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

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I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.

Civil Action Nos. 13–234, 13–362, 13–413.

[Aug. 22, 2014]

ORDER AND REASONS

MARTIN L. C. FELDMAN, *District Judge*:

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the

federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross-motion.

Additionally before the Court are two motions to strike extra-record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases—landowners and a lessee of a tree farm in Louisiana—challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately–owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule

designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species . . . to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery

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[1] Technically, administration responsibilities are divided between the Department of Interior and the Department of Com-

objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16 U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine. . .."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.*, 16 U.S.C. § 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A) ("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable . . . (i) shall concurrently with making a [listing] determination . . . designate any habitat of such species. . .."). Like its listing duty, FWS's habitat designation duty is mandatory;[2] the designation

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merce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001) ("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'").

It is incumbent on the Secretary—"to the maximum extent prudent and determinable"—to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later

designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species . . . to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery

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[1] Technically, administration responsibilities are divided between the Department of Interior and the Department of Com-

objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16 U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine. . .."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.*, 16 U.S.C. § 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A) ("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable . . . (i) shall concurrently with making a [listing] determination . . . designate any habitat of such species. . .."). Like its listing duty, FWS's habitat designation duty is mandatory;[2] the designation

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merce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001) ("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'").

It is incumbent on the Secretary—"to the maximum extent prudent and determinable"—to designate critical habitat concurrently with listing a species as endangered. 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later

must be based on "the best scientific data available . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determi-

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designation. *See* 16 U.S.C. § 1532(a)(3)(B) ("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established . . . ."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii) (if "critical habitat of [listed] species is not . . . determinable [at the time of listing], the Secretary . . . may extend the one-year period specified in paragraph (A) by not more than one additional year . . . .") and 50 C.F.R. § 424.17(b)(2).

> nation by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical *occupied* habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3] 50 C.F.R. § 424.12(b). FWS may designate as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat . . ." 16 U.S.C. § 1536(a)(2).[4] If FWS or the consulting federal agency

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club*, 245 F.3d at 442–43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where

determines that a contemplated action "may affect . . . critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (*Rana Sevosa*) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129–35131. They

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an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.") (emphasis in original).

[5] "Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

travel to small, isolated ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered species. FWS determined that the frog was endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking.

[7] "Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. *Id.* at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two historical breeding sites for the frog. Based on the comments, FWS

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana." FWS identified additional critical habitat in Mississippi and Louisiana,[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 mil-

[11] FWS was not able to identify critical habitat in Alabama.

lion").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the land in Unit 1 is owned by Weyerhaeuser Company,

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaeuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531 et. seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551 et. seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et. seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits.

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for supplementing, or challenging, the administrative record; no party requested to supplement the record.

record evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249–50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible

in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987); Fed. R. Civ. P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA—in particular, a final rule designating critical habitat—the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear*, 520 U.S. 154, 174–75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000) (Courts must be particularly deferential to agency determinations made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant fac-

tors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415–16, (1971) ("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 391 n.15 (5th Cir. 2001) (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985)) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February 8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record;

and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County,* 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . .
> (2) the district court needed to supplement the record with "background information" in

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(2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> order to determine whether the agency considered all of the relevant factors, or
> (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*,—— U.S.——, 133 S. Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008).

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *See Summers v. Earth Island Institute,* 555 U.S. 488, 493 (2009); *see also Doe v. Beaumont Independent School Dist.,* 240 F.3d 462, 466 (5th Cir. 2001) (citing *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.,* 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).[19] The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they chal-

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan*, 504 U.S. at 561–62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 895–96 (D.C. Cir. 2006) (an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect . . . even a single" member of the association); *see also Am. Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.*, 429 F.3d 1113, 1119 (D.C. Cir. 2005) (firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive ef-

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lenge whether the injury is likely to be redressed by a favorable ruling.

fect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" Lujan, 504 U.S. at 561, 112 S. Ct. 2130 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation . . . has immediately devalued the land within Unit 1 for commercial purposes by bringing increased . . . regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they submit that the designation "limits the usability and saleability of the property" to their detriment.

regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce

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[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser . . . periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce . . . among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-*Lopez*

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. *See Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008) (vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend *Lopez*, which dealt with a challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" *GDF*, 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1053–54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Gonzales*, 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme. *See GDF*, 326 F.3d at 640–41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for

conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n.9 (1984) ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland

> pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on

this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on *recovery* of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat be-

cause Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant PCEs. *See* 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide.

Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

"only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989 (9th Cir. 2010) (rejecting argument that FWS must first identify the point at which the endangered species is considered conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008) ("While tempting in its logical simplicity . . . the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), *aff'd, Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (2010), *cert. denied*, 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly re-

butted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument—to the extent it is reviewable (*see The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (Service's decision not to exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map. . .[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed . . . that were determined to be essential for the conservation of the species. . .." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." *Id.* FWS "chose the value of 621 m. . .by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog . . . and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use. . .." *Id.* FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." *Id.* With respect to Unit 1, FWS ex-

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa,* will

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plained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. *Id.* at 35123–25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. *See Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List . . . to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants acceptance as its own species . . . and the scientific name for the species was changed to *Rana sevosa*." 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30] And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1260 (11th Cir. 2007) ("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position. . .on the question and is supported by. . . peer review[,] and by the opinion of the Service's own experts.").

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that Weyerhaeuser, a co-owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why—(assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies—FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its

conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. *See* 16 U.S.C. § 1533(b)(2) (the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); *see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010) (citing *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1032 (D. Ariz.

2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations's economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens

imposed by simply listing the frog) are treated as part of the regulatory baseline and are not factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation . . . to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II*, 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 mil-

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results.

lion"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion—its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered—is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that these economic

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et. seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 850 (5th Cir. 2013) (quoting *Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998)).

long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. *Id.* To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particu-

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

lar result." *Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003) (NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed. Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429, 1436–39 (10th

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[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities such as timber management lack a federal nexus and are therefore exempt.

Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. *Id.* Unlike the critical habitat designation in that case—where the environmental impact of the critical habitat designation "will be immediate and disastrous"—the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. *Douglas County v. Babbitt,* 48 F.3d 1495, 1501–08 (9th Cir. 1995) (considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. *Id.* Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See*

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 202 F. Supp. 2d 594, 646–48 (W.D. Tex. 2002) (citations omitted).

Sabine River Authority v. U.S. Dept. of Interior, 951 F.2d 669, 679 (5th Cir. 1992) ("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall*, 562 F.3d 712, 721–23 (5th Cir. 2009) (setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

* * *

Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

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[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

MARKLE INTERESTS, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C.,
Plaintiffs–Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees
Weyerhaeuser Company,
Plaintiff–Appellant

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees

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Cons. w/14-31021

February 13, 2017
Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans, Martin L.C. Feldman, U.S. District Judge

ON PETITION FOR REHEARING EN BANC
(Opinion June 30, 2016)

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

Opinion

STEPHEN A. HIGGINSON, *Circuit Judge*:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

JONES, *Circuit Judge*, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, *Circuit Judges*, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." *See* 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied) Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong.

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be

> critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii).

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plan-

tations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical-habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any dispropor-

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tionate costs that are likely to result from the designation." *Id.* at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[1] *Id.* at 472 n.20. Finally, the panel majority

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[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The

held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect.

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the

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touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non-habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

The ESA states that the Service

> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is

required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical" portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species . . . and habitat of such species that has been designated as

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"); *Habitat, Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue

naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall,* in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.*

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This predecessor provision, like the current consultation requirements, refers to the destruction or modifica-

tion of "habitat of such species which is determined by the Secretary . . . to be critical."[3] From the very beginning, Congress rooted the concept of critical habitat in the relevant species' actual habitat.

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on* H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, *and* H.R. 4758 *Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . .. I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . .. While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . .. In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation.[4] As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be habitat*. A diagram explains this statutory plan:

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

> The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit deci-

sion. Neither of these objections should be persuasive.

The first objection—that this textualist argument was waived—is easily disposed of. Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement ex-

ists,[5] but a reviewing court could not cite the same context and related regulations to say a habitability requirement does in fact exist. This objection is meritless.

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

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[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. The Ninth Circuit appeared to assume that critical-habitat designation of those unoccupied, uninhabitable areas was the only means of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

* * *

For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habi-

tat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)–(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features*

. . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas* . . . [that] are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose."[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conserva-

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

tion would be a more substantial undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion.*

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

provisions.[9] Mirroring the respective Houses' proposals,[10] Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that

the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of

unoccupied critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared. "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious con-

cern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id.* *See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472

n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity of a Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[ ] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to ar-

ticulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the

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[12] *Markle Interests*, 827 F.3d at 471.

[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C.

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[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent. . .").

§ 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g., Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the panel majority's one-feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an "unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non-Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [ ] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is review-

able for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [ ] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [ ] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary."

The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [ ] economic impact" "is not reviewable." *Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it—"strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Chaney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

ESA's permissive language: "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed, and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard.

The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

APPENDIX D

16 U.S.C. § 1532. Definitions

For the purposes of this chapter—

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

* * * * *

16 U.S.C. § 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * * * *

(b) Basis for determinations

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * *

APPENDIX E

50 C.F.R. § 424.12 Criteria for designating critical habitat.

Effective: May 1, 2012

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to

its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

* * * * *

§ 424.19 Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS MARKLE INTERESTS, LLC; P&F LUMBER COMPANY 2000, LLC; AND PF MONROE PROPERTIES, LLC'S MOTION FOR DIVIDED ORAL ARGUMENT

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INTRODUCTION

Pursuant to Supreme Court Rules 21 and 28.4, Respondents Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC (collectively Family Landowners), respectfully move for divided argument. The Family Landowners request that argument time be divided by allowing 20 minutes for Weyerhaeuser Company's counsel to appear first and 10 minutes for the Family Landowners' counsel to appear second. This division of time will ensure that the Court can test the Family Landowners' unique argument regarding the second question presented, and it also will ensure the parties with the greatest stake in this case have their interests fully represented before the Court. As explained below, Weyerhaeuser treats the second question presented as settled by *Bennett v. Spear*, 520 U.S. 154 (1997). *See* Weyerhaeuser Merits Br. at 46. ("*Bennett* answers the second question presented by our petition."). But, as the Family Landowners have argued, while this Court could rely exclusively on *Bennett* to hold the claim justiciable, Family Landowners' Merits Br. at 49-50, the second question nonetheless presents an important and unsettled question about the scope of judicial review of discretionary agency decisions under the *Heckler* test. *Heckler v. Chaney*, 470 U.S. 821 (1985); *see* Family Landowners Merits Br. at 40-49 (arguing the Court should adopt the test from Justice Scalia's dissent in *Webster v. Doe*, 486 U.S. 592 (1988)).

Respondent Intervenors Center for Biological Diversity and Gulf Restoration Network do not oppose the motion. Federal Respondents U.S. Fish & Wildlife

Service, *et al.* (Service), take no position on the motion. Weyerhaeuser does not consent to the motion.

ARGUMENT

This case addresses the Family Landowners' challenge to the Service's June 12, 2012, designation of 1,544 acres of forested land in St. Tammany Parish, Louisiana, as critical habitat for the dusky gopher frog. *See* 77 Fed. Reg. 35,118. The Family Landowners and St. Tammany Land Company,[1] which all originally challenged the regulation directly, own 90% of the land at issue; Weyerhaeuser owns the remainder. *See* Pet. App. 88a-89a. The dusky gopher frog does not inhabit the property and the property cannot support the frog without extensive modifications that would cause great economic harm to the Family Landowners. The Service's designation of this Louisiana property is not only bewildering—particularly because almost 5,000 acres of existing critical habitat in Mississippi can actually support the frog—it also violates the Endangered Species Act (ESA) and the Administrative Procedure Act (APA).

Markle Interests, one of the Family Landowners, sued to challenge the critical habitat designation under both the ESA and the APA on February 7, 2013. *See* Pet. App. 88a-89a; Jt. App. JA3. The other Family Landowners and St. Tammany Land Company then filed the same claims against the same defendants on February 26, 2013. *See* Pet. App. 88a-89a. Lastly, Weyerhaeuser followed suit with its own identical claims as well. The latter two cases were consolidated with the first. *See* Pet. App. 89a. The Family

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[1] St. Tammany Land Company is no longer involved in the litigation as a party.

Landowners and the other plaintiffs in the consolidated litigation each filed their own motions for summary judgment in the trial court. On appeal to the Fifth Circuit, the Family Landowners and Weyerhaeuser filed joint briefs. The Fifth Circuit denied relief twice—first over Judge Priscilla Owen's dissent in a 2-1 panel decision and then over a Judge Edith Jones-authored dissent in an 8-6 denial of rehearing en banc.

The Family Landowners filed a petition to this Court which remains pending. *See Markle Interests, LLC v. U.S. Fish & Wildlife Service*, No. 17-74. Weyerhaeuser filed its own petition for writ of certiorari which this Court granted on January 22, 2018. The questions under review are: (1) Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation; and (2) Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

The Court should grant this motion for divided argument between Weyerhaeuser Company and Family Landowners for two reasons. First, the Family Landowners' participation will allow the Court to fully explore the unique argument Family Landowners raise on the second question presented. Weyerhaeuser gives this question short shrift, arguing only that it was resolved by *Bennett v. Spear*, whereas Family Landowners address the complexity of this important issue and urge the Court to adopt the test for judicial review of discretionary agency actions articulated by the late Justice Scalia in *Webster v. Doe*, 486 U.S. at 608 (Scalia, J., dissenting). Second, because the

Family Landowners own the vast majority of the designated property, they bear the bulk of the potential $34 million burden under the challenged regulation; they have the largest stake in the outcome of this case. The Court will benefit from having Family Landowners address the unique arguments they raise on the second question presented, and the Family Landowners should have their interests fully heard and argued by their choice of counsel.

I

THE COURT WILL BENEFIT FROM HEARING THE FAMILY LANDOWNERS' UNIQUE ARGUMENT ON THE SECOND QUESTION PRESENTED

To be sure, "most courts," including this one, "permit time-splitting only in rare cases." *See* Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 148 (Thomson/West 4th ed. 2008). But "[t]he rare case in which time splitting is appropriate arises when each of the two plaintiffs . . . has a claim or a defense that the other one does not share." *Id.* at 149. While the Family Landowners' argument is not exactly a different *claim* or *defense*, in that both Weyerhaeuser and the Family Landowners are similarly situated legally and presented the same claims and defenses below, the Family Landowners' argument set forth in their merits brief raises a distinctive legal theory not advanced by Weyerhaeuser. Thus, argument on this distinct and important point will benefit the parties and allow the Court to test the theory in a full back-and-forth exchange. It benefits the parties because it allows the party advancing the argument to make the argument to the Court, and it relieves Weyerhaeuser's

counsel of any responsibility to advance at oral argument an argument counsel did not make. Accordingly, the logic advanced by Justice Scalia and Garner in *Making Your Case* suggests this is one of the rare situations where splitting time is appropriate.

Only the Family Landowners argue that the Court should recede from the *Heckler v. Chaney* test for judicial reviewability of agency action and instead adopt the test set out by Justice Scalia in *Webster v. Doe*. *See Webster v. Doe*, 486 U.S. at 608 (Scalia, J., dissenting). In *Heckler*, this Court held that agency action "committed to agency discretion by law," as set out in the APA at 5 U.S.C. § 701(a)(2), means that judicial "review is not to be had if the statute [under review] is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. This Court provided little guidance to elaborate upon the "no law to apply" test other than to explain that agency decisions not to criminally prosecute or civilly enforce are beyond judicial review, *id.* at 831-33, and to hold that the "no law to apply" test applies when Congress intends for it to apply. *See Webster*, 486 U.S. at 601.

Justice Scalia rejected that test. He explained that the *Heckler* "no law to apply test" for determining reviewability of agency decisions did not adequately convey what Congress intended when it prohibited judicial review of actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). He saw the error arising in the *Heckler* test's artificial limitation on the court's ability to review an agency decision only if the statute *at issue* offered law to apply for purposes

of judicial review. To Justice Scalia, the language Congress used in § 701(a)(2) demonstrated that the courts were free to look to whether there was *any* law or legal standard to apply to the agency's decision when deciding to review it, not just some law allowing for judicial review in the statute itself. This, according to Justice Scalia, means that there is "no law to apply" *only* if the agency action is the type of decision traditionally held unreviewable by the courts, like actions arising in the political question context, or are protected by sovereign or official immunity, or comprise other areas where courts have traditionally deferred out of respect to the other branches. *Webster*, 486 U.S. at 609. In any other circumstance, the Constitution, the APA, and principles of administrative law provide the *law* to apply in reviewing an agency's exercise of discretion. *See* Family Landowners' Merits Br. at 38-49.

The Family Landowners alone argue that Justice Scalia's formulation is the proper understanding of the "no law to apply" test. Adopting it would align the Court's jurisprudence with *the text* of § 702(a)(2) and this Court's recent precedents confirming that exceptions to judicial review of agency actions are exceedingly narrow. *Sackett v. E.P.A.*, 566 U.S. 120, 129 (2012) (noting "APA's presumption of reviewability for all final agency action"); *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1811 (2016) (same).

The Court should have an opportunity at oral argument to consider—and question—the Family Landowners' counsel regarding this argument. For its part, Weyerhaeuser simply argues that this Court's decision in *Bennett v. Spear* all but settles the

availability of judicial review in this case. Weyerhaeuser accepts the *Heckler* "no law to apply" test, a test that amounts to little more than "a truism." *See* Damien Schiff, *Judicial Review Endangered: Decisions Not To Exclude Areas From Critical Habitat Should Be Reviewable Under the APA*, 47 ELR 10352, 10359 (2017).

The Family Landowners' unique argument merits careful consideration by this Court, and the request for divided argument should be granted. *See* Scalia & Garner, *supra* at 148-49.

II

THE FAMILY LANDOWNERS' GREATER STAKE IN THIS LITIGATION WARRANTS DIVIDED ARGUMENT

The Family Landowners have for many decades owned the vast majority of the 1,544 acres at issue which they are leasing to Weyerhaeuser until 2043 for timber harvesting. *See* Pet. App. 88a. Weyerhaeuser owns approximately 152 acres of this land. *See id.* Ultimately, the Family Landowners intend to develop their land and already have a plan in place to do so. But as the Service explains in its designation, the restrictions on the use of the land at issue may preclude any development at a cost to the landowners of up to $33.9 million over 20 years. 77 Fed. Reg. 35,141. Because the Family Landowners own most of the land at issue, they will bear the vast majority of the economic burden.

Even if the federal government ultimately decides to allow some development of the land after consultation, the Family Landowners will still suffer severe financial losses as a result of the critical

habitat designation. A critical habitat designation will substantially increase the time and expense of acquiring any federal permit necessary to develop their land and may require large dedications of land in exchange for the right to develop any of the land. Given their large and consequential interest in the outcome of this case, they respectfully request an opportunity to participate in oral argument, to ensure their interests are fully represented.

CONCLUSION

For the foregoing reasons, both Weyerhaeuser's and the Family Landowners' participation in oral argument will materially assist the Court. The Family Landowners therefore request that argument time be divided allotting 20 minutes for Weyerhaeuser Company's counsel to appear first, and 10 minutes for the Family Landowners' counsel to appear second.

DATED: July 6, 2018.

Respectfully submitted,

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No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S OPPOSITION TO MOTION OF RESPONDENTS MARKLE INTERESTS, LLC, ET AL., FOR DIVIDED ARGUMENT

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OPPOSITION TO MOTION FOR DIVIDED ARGUMENT

Petitioner Weyerhaeuser Company respectfully opposes the motion for divided argument of Markle Interests, LLC, *et al.*, who are respondents in this case by operation of Rule 12.6. The Markle parties filed a separate certiorari petition from the judgment of the Fifth Circuit, No. 17-74, which this Court did not grant when it granted the writ in No. 17-71.

As recognized by the Markle respondents, "[d]ivided argument is not favored" (Rule 28.4), and it is rarely granted between private parties. There is no reason to grant it here, inviting the problems described by Justice Jackson that "[w]hen two lawyers undertake to share a single presentation, their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing." Justice Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 802 (1951) (quoted in Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 776-777 (10th ed. 2013)).

The Markle respondents do not assert that their interests or arguments in this litigation conflict with or are inconsistent with those of petitioner Weyerhaeuser. Instead, they point to one additional sub-argument that they made in their brief in support of Weyerhaeuser, but which Weyerhaeuser did not make in its opening brief, concerning the second question presented (a question that the Markle respondents did not present in their own certiorari petition in No. 17-74).

In that sub-argument concerning the reviewability of FWS's decision not to exclude Unit 1 from critical habitat designation on economic grounds, the Markle

respondents ask this Court to adopt as the law their reading of Justice Scalia's dissenting opinion in *Webster* v. *Doe*, 485 U.S. 592 (1988). The Markle respondents fully briefed that argument in their opening brief (at 41-44), the United States responded (at 49 n.12), and now Markle has the opportunity to address that argument again in a reply brief. See Rule 25.3. No more is necessary. See SUPREME COURT PRACTICE, *supra*, at 778 (observing that in *Lexecon, Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 521 U.S. 1150 (1997), this Court refused "to allow separate argument from co-defendants making overlapping but divergent points in their briefs").

Notably, Weyerhaeuser has strongly advocated (at 45-56) that the U.S. Fish and Wildlife Service's decision not to exclude Unit 1 from critical habitat designation is judicially reviewable, carefully distinguishing *Heckler* v. *Chaney*, 470 U.S. 821 (1985), on which the Fifth Circuit principally relied. And no fewer than twelve petitioner-side amicus briefs addressed the reviewability question, a number devoting their entire briefs to that issue. All reviewability arguments have been fully aired.

Otherwise, the Markle respondents point only to the fact that they have different ownership interests in Unit 1. But Weyerhaeuser owns part of Unit 1 outright, has a lease on all of the remaining land at issue through 2043, and actually operates the land on a day-to-day basis as a commercial forest.

There is therefore no reason to think that Weyerhaeuser's and the Markle respondents' interests in this litigation are in any way inconsistent—indeed,

respondents do not claim that they are. Nor, in an Administrative Procedure Act challenge based on an administrative record is there any reason to think that the Markle respondents could bring to oral argument any relevant factual nuance worth the disruption that is inevitably caused by dividing a 30 minute argument.

CONCLUSION

For the foregoing reasons, the Markle respondents' motion for divided argument should be denied.

JULY 9, 2018

/S/ Timothy S. Bishop

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Nos. 17-71 and 17-74

In the Supreme Court of the United States

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

MARKLE INTERESTS, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In 2012, following scientific review and public comment, the U.S. Fish and Wildlife Service (Service) issued a regulation designating critical habitat for the dusky gopher frog, an endangered species listed under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* The questions presented are as follows:

1. Whether the Service's designation of a portion of petitioners' land as critical habitat—land that the frog previously occupied, and that continues to contain rare ephemeral ponds associated with the frog's breeding habitat—was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Whether the court of appeals properly declined to review the Service's discretionary decision not to exclude petitioners' land from the designation of critical habitat on grounds of economic impact.

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In the Supreme Court of the United States

No. 17-71

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

No. 17-74

MARKLE INTERESTS, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-77a[1]) is reported at 827 F.3d 452. The opinion of the district court (Pet. App. 78a-122a) is reported at 40 F. Supp. 3d 744.

[1] Citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 17-71. Citations to "Weyerhaeuser Pet." are to the petition in No. 17-71; citations to "Markle Pet." are to the petition in No. 17-74.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2016. A petition for rehearing was denied on February 13, 2017 (Pet. App. 123a-162a). On March 27, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 29, 2017. On June 9, 2017, Justice Thomas further extended the time to and including July 13, 2017. The petition in No. 17-71 was filed on July 11, 2017, and the petition in No. 17-74 was filed on July 12, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. 1531(b). Responsibility for administering the ESA is shared by the Secretary of the Interior and the Secretary of Commerce. 16 U.S.C. 1532(15). The U.S. Fish and Wildlife Service (Service) implements the ESA with respect to species under the jurisdiction of the Secretary of the Interior. 50 C.F.R. 17.11, 402.01(b).

The ESA directs the Service to identify endangered and threatened species and to include those species on lists published in the Federal Register. 16 U.S.C. 1533(a)(1)-(2) and (c). When it determines a species to be threatened or endangered, the Service is also required, "to the maximum extent prudent and determinable," to promulgate a regulation designating the "critical habitat" of that species. 16 U.S.C. 1533(a)(3)(A)(i).

A species' "critical habitat" comprises two categories. First, critical habitat includes "the specific areas *within* the geographical area occupied by the species, at the time it is listed * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i) (emphasis added). Second, "specific areas *outside* the geographical area occupied by the species at the time it is listed" may be designated as critical habitat "upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii) (emphasis added). At all times relevant here, the Service's regulations provided that areas in the second category could be designated as critical habitat only "when a designation limited to [a species'] present range would be inadequate to ensure the conservation of the species." 50 C.F.R. 424.12(e) (2012).

The term "conservation," as used in the critical-habitat provisions, means "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"; those measures may include, *inter alia*, "habitat acquisition and maintenance, propagation, live trapping, and transplantation." 16 U.S.C. 1532(3). Because "the ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species," the term "'[c]onservation' is a much broader concept than mere survival." *Sierra Club* v. *United States Fish & Wildlife Serv.*, 245 F.3d 434, 441-442 (5th Cir. 2001).

In designating a species' critical habitat, the Service must rely on the "best scientific data available" and "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless such an exclusion would result in the extinction of the species. *Ibid.*

"The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area"; "does not allow the government or public to access private lands"; and "does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners." 77 Fed. Reg. 35,118, 35,128 (June 12, 2012). Rather, the "only regulatory effect" of designating private lands as critical habitat, *id.* at 35,143, is that a federal agency, in consultation with the Service, must "insure that any action authorized, funded, or carried out by such agency * * * is not likely to * * * result in the destruction or adverse modification" of the designated critical habitat. 16 U.S.C. 1536(a)(2).[2] If this consultation process reveals that a proposed agency action is likely to destroy or adversely modify the designated critical habitat, the Service issues an opinion that "suggest[s] * * * reasonable and prudent alternatives" to the

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[2] A federal agency must also separately ensure, in consultation with the Service, that "any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2).

proposed action, if available. 16 U.S.C. 1536(b)(3)(A); see 50 C.F.R. 402.02 (specifying that such alternatives must be "economically and technologically feasible"). Where a federal agency does not authorize, fund, or carry out activities on the designated critical habitat, no consultation with the Service is required.

2. a. The Service listed the dusky gopher frog (*Rana sevosa*) as an endangered species in 2001. 66 Fed. Reg. 62,993 (Dec. 4, 2001); see 77 Fed. Reg. at 35,118-35,119 (describing history).[3] The dusky gopher frog is a "terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. Historical records showed that the frog previously inhabited several counties or parishes in Alabama, Louisiana, and Mississippi. 66 Fed. Reg. at 62,994. By the time of the listing in 2001, however, the Service identified only one population still in existence: approximately 100 adult frogs at a single pond in Mississippi. *Id.* at 62,995. The Service found that the frog's continued existence as a species was threatened by its small population size and by habitat destruction due to fragmentation and conversion of the frog's ecosystem. *Id.* at 62,997-63,000.

At the time it listed the species as endangered, the Service deferred its designation of critical habitat due to budget limitations. 66 Fed. Reg. at 62,300. Following a lawsuit, however, the Service entered into a court-approved settlement agreement in which it agreed to a rulemaking schedule for designating the frog's critical

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[3] At the time it was listed as endangered, the frog was known as the "Mississippi gopher frog" and was understood to be a "distinct population segment" of the "gopher frog" species. 66 Fed. Reg. at 62,993. The Service later determined that the frog "warrant[ed] acceptance as its own species," and it adopted a proposal to use the common name "dusky gopher frog." 77 Fed. Reg. at 35,118.

habitat. See 77 Fed. Reg. at 35,118-35,119 (describing history).

b. Pursuant to that agreement, the Service published a proposed critical-habitat rule in 2010. 75 Fed. Reg. 31,387 (June 3, 2010). In the proposed rule, the Service identified and detailed three categories of "physical and biological features" needed to "sustain the essential life history functions" of the frog: (1) "ephemeral" (*i.e.*, seasonally existing) ponds necessary for the frog's breeding; (2) "[u]pland forested nonbreeding habitat"; and (3) "upland connectivity habitat between breeding and nonbreeding habitats." *Id.* at 31,393, 31,404.

The Service noted that, although only one population of frogs had been known in 2001, two other small populations had since been discovered at nearby sites in Mississippi, and another nearby population was established through human intervention. 75 Fed. Reg. at 31,389, 31,397. But the habitat occupied by the frog remained highly localized and fragmented, and the Service cautioned that the frog still faced a high risk of extinction from a drought or other random event. See *id.* at 31,394-31,395. The Service therefore proposed to designate as critical habitat, in addition to the areas occupied by the frog, several areas that were unoccupied by the frog but were determined to be essential for its conservation. See *id.* at 31,395-31,399. All of the areas were located within four counties in southeastern Mississippi. *Ibid.*

In addition to soliciting public comment, the Service obtained peer review of the proposed designation by six specialists with scientific expertise concerning the species, the geographic region, and conservation-biology principles. See 77 Fed. Reg. at 35,119; Pet. App. 86a; cf.

59 Fed. Reg. 34,270 (July 1, 1994) (agency policy on soliciting peer review). The peer reviewers were "united in their assessment" that the Service's proposed critical-habitat designation was "inadequate for the conservation of the dusky gopher frog." 77 Fed. Reg. at 35,123-35,124; see also *id.* at 35,119. As one reviewer explained, "the low number of remaining populations and [the species'] very restricted range" meant that the frog was "at risk of extirpation from events such as drought or disease" or other random, localized occurrences. C.A. E.R. 1568 (Jan. 1, 2015); see also Pet. App. 16a-17a (noting the "consensus expert conclusion" that "the designated habitat in the [2010] proposal was inadequate to ensure the conservation of the frog"). The peer reviewers therefore recommended that the agency "look within the species' historic range outside the state of Mississippi for additional habitat for the designation." 77 Fed. Reg. at 35,124.

After considering those comments, the Service agreed that the dusky gopher frog was "at high risk of extirpation from stochastic events, such as disease or drought," which are "likely to occur at the same time at sites near each other." 77 Fed. Reg. at 35,121, 35,124. The Service concluded that, to guard against the consequences of "local catastrophic events," "recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 35,125; see also *id.* at 35,135 (concluding that "population expansion outside of the core population areas in Mississippi" was "a necessary component of recovery efforts" and thus essential for the conservation of the species). The Service therefore undertook to identify other sites that might appropriately be designated as critical habitat for the frog.

In undertaking this process, the Service made "the primary focus of [its] reanalysis" the identification of suitable breeding habitat. 77 Fed. Reg. at 35,124. The Service focused on breeding habitat because of the "rarity" of "open-canopied, isolated, ephemeral ponds within the historic range of the dusky gopher frog" and because of such ponds' "importance to survival of the species." *Ibid.*

One of the peer reviewers drew the Service's attention to a site within St. Tammany Parish in Louisiana, later designated as "Unit 1." 77 Fed. Reg. at 35,135; Pet. App. 105a. Unit 1 hosted a population of dusky gopher frogs—the last known population outside Mississippi—as late as 1965, and still contained a unique collection of ephemeral ponds that would support breeding by the frog. 77 Fed. Reg. at 35,135.

The Service inspected Unit 1 and found that it "provide[s] breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." 77 Fed. Reg. at 35,124. The five ephemeral ponds located on Unit 1 are "intact and of remarkable quality." *Id.* at 35,133. Indeed, "no group of five ponds such as these was found in any of the areas of historical occurrence that [the Service] searched in Mississippi." *Ibid.* The Service determined that "[i]f dusky gopher frogs are translocated to the site, the five ponds are in close enough proximity to each other that adult frogs could move between them and create a metapopulation, which increases the chances of the long-term survival of the population." *Id.* at 35,135. The Service acknowledged that the uplands surrounding the ponds were "poor-quality terrestrial habitat" for the frog, but found that these areas would be "restorable

with reasonable effort." *Id.* at 35,133, 35,135. Accordingly, in 2011, the Service issued a revised proposed designation that included Unit 1. See 76 Fed. Reg. 59,774, 59,783 (Sept. 27, 2011).

c. Following additional rounds of public comment and a public hearing, the Service finalized its designation of critical habitat for the dusky gopher frog in June 2012. 77 Fed. Reg. at 35,118, 35,119. The Service included Unit 1 (comprising 1544 acres) within the final rule, finding it to be "essential for the conservation of the species." *Id.* at 35,135. The Service explained that "[m]aintaining the five ponds within this area as suitable habitat into which dusky gopher frogs could be translocated" is "essential to decrease the risk of extinction of the species resulting from stochastic events and [to] provide for the species' eventual recovery." *Ibid.*

The Service addressed public comments disagreeing with its designation of Unit 1. The Service acknowledged that the dusky gopher frog does not currently inhabit the site; that the current landowners object to translocation of the frog; and that restoration of the surrounding uplands would be needed if translocation were to occur. See 77 Fed. Reg. at 35,123. The Service explained that Unit 1 nonetheless is "essential for the conservation of the species" because it contains breeding habitat of a quality not known to exist anywhere else within the frog's historical range, and includes at least "two historic breeding sites" for the frog. *Id.* at 35,123-35,124. The Service rejected the suggestion that "artificial ponding" at another location was an adequate substitute, explaining that "[e]phemeral, isolated ponds are very difficult to establish in the landscape due to their short and specific hydrology," and that efforts to establish an artificial pond in Mississippi had already taken a

decade and not yet proven successful. *Id.* at 35,123. The Service also indicated that, although it could not require the owners of Unit 1 to allow the frog's return, it "hope[d] to work with the landowners to develop a strategy that will allow them to achieve their objectives" while also "protect[ing] the isolated, ephemeral ponds that exist there," and noted that federal funds may be available for such efforts. *Ibid.*

As required by 16 U.S.C. 1533(b)(2), the Service also considered the economic impact of its critical-habitat designation. 77 Fed. Reg. at 35,140-35,141. The Service found that "considerable uncertainty exist[ed]" concerning the economic impact of including Unit 1 in the designation, inasmuch as that designation would not change the use of the property but would merely impose consultation requirements on any federal agencies acting with respect to Unit 1 under other statutes. *Ibid.*; cf. 16 U.S.C. 1536(a)(2). The Service found it unclear whether "a Federal nexus for development activities" would ever exist for the site, such as the need for a federal permit to discharge fill material into "jurisdictional wetlands" under the Clean Water Act, 33 U.S.C. 1251 *et seq.* 77 Fed. Reg. at 35,140.

The Service posited three economic-impact scenarios. In the first scenario, future use or development of Unit 1 would not require any federal permits, and thus would not invoke any consultation under Section 7 of the ESA; in that scenario, the designation would have no incremental economic impact. 77 Fed. Reg. at 35,140. In the second scenario, the Service assumed that future development of Unit 1 would require a Clean Water Act permit, and that the ensuing consultation would yield an arrangement under which 40% of the site would be de-

veloped for private use and 60% set aside for conservation. The Service calculated the economic impact of the designation of Unit 1 in this scenario as $20.5 million. *Id.* at 35,140-35,141. Finally, in a third scenario, the Service posited that if future development of Unit 1 required consultation, and if the Service in turn "recommend[ed] that no development occur within the unit," the expected impact to landowners would be $33.9 million. *Id.* at 35,141.

The Service then considered whether to exercise its discretionary authority to exclude any areas from the designation of critical habitat, assuming it determined the benefits of exclusion to outweigh those of inclusion. Cf. 16 U.S.C. 1533(b)(2). The Service found substantial conservation benefits for the frog from designating Unit 1 as critical habitat, and noted that those benefits were "best expressed in biological terms." 77 Fed. Reg. at 35,141. Based on its consideration of both potential economic impacts and conservation benefits, the Service ultimately determined against "exercising [its] discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Ibid.*

3. Petitioner Weyerhaeuser Company in No. 17-71, and petitioners Markle Interests, LLC, et al. in No. 17-74, collectively own all of the land within Unit 1. See Weyerhaeuser Pet. 11; Markle Pet. 7-8. For the portions of Unit 1 that it does not own, Weyerhaeuser holds a long-term lease to "grow and harvest timber" on the site; that lease expires in 2043. Weyerhaeuser Pet. 11.

In 2013, petitioners filed three suits in the Eastern District of Louisiana challenging the Service's inclusion of Unit 1 within its designation of critical habitat. Petitioners asserted that the Service's actions violated the

ESA, the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and exceeded constitutional authority under the Commerce Clause. Pet. App. 89a. The district court consolidated the suits and allowed two environmental groups (the Center for Biological Diversity and Gulf Restoration Network) to intervene in defense of the Service's actions. *Id.* at 88a-89a.

On cross-motions for summary judgment, the district court resolved all merits issues in favor of the Service. Pet. App. 78a-122a.[4] Considering the administrative record supporting the Service's designation, the court rejected petitioners' argument that the designation of Unit 1 as critical habitat was arbitrary and capricious, explaining that the Service's "finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record." *Id.* at 106a. The court observed that the Service included Unit 1 only after the Service's original designation "was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog." *Id.* at 104a. Observing that petitioners "d[id] not meaningfully dispute the scientific and factual bases" of the Service's determination, *id.* at 106a, the court credited the Service's scientific judgment that Unit 1 was essential to the conservation of the frog because it "provide[s] breeding habitat that in its totality is not known to be present elsewhere within [the frog's] historic range," *id.* at 108a.

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[4] The district court ruled in favor of petitioners on the threshold issue of standing. Pet. App. 95a-99a.

The district court also rejected petitioners' other arguments. As relevant here, the court held that the Service properly "considered [the] potential economic impacts" of its designation of critical habitat and "determined that the[] economic impacts to Unit 1 were not disproportionate." Pet. App. 117a-118a. The court also rejected petitioners' arguments under the Commerce Clause, explaining that their "constitutional claim is foreclosed by binding precedent." *Id.* at 99a-100a.

4. a. On consolidated appeals, a divided panel of the court of appeals affirmed. Pet. App. 1a-77a.

Like the district court, the panel concluded that the administrative record supported the Service's determination that Unit 1 is "essential for the conservation of the species" and thus was properly designated as unoccupied critical habitat under Section 1532(5)(A)(ii). Pet. App. 32a. The panel noted that petitioners had not challenged the Service's finding that a designation limited to the frog's present range would be inadequate, *id.* at 17a, nor had petitioners "dispute[d] the scientific or factual support for the Service's determination that Unit 1 is essential" for the frog's conservation, *id.* at 20a-21a. The panel acknowledged that future occupation of Unit 1 would likely occur only after translocation of the frog and modifications to the surrounding uplands, which petitioners opposed and the Service could not compel. But the panel concluded that nothing in the statute precluded a reasoned determination that the area remained essential for the frog's conservation. *Id.* at 23a-27a; see also *id.* at 15a, 22a (stating that "the Service's interpretation of the term 'essential' is entitled to * * * deference" under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

The panel rejected suggestions that upholding the Service's action on this record would mean that there are no meaningful limits on the Service's authority to designate critical habitat. The panel specifically rejected the dissent's contention that, under its decision, "the Service [could] designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue." Pet. App. 30a n.20 (citation omitted). The panel explained that it "create[d] no such generalized rule," but instead held only that "*in this case*, substantial, consensus, scientific evidence in the record support[ed] the Service's conclusion" that Unit 1 was essential for the frog's conservation. *Ibid.* In particular, the panel reasoned that the Service's designation was sustained by a "scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 29a.

The panel declined to review petitioners' challenge to the Service's decision not to exclude Unit 1 from the designation of critical habitat on economic-impact grounds. The panel reasoned that, although Section 1533(b)(2) requires the Service to consider economic and other impacts, the ESA ultimately leaves to the Service's discretion whether to exclude any areas on that basis. The panel explained that the ESA sets forth "no manageable standards for reviewing the Service's decision not to exercise [that] discretionary authority," such that the decision was committed to agency discretion. Pet. App. 34a. The panel noted that this holding accorded with decisions by the Ninth Circuit and "every district court that has addressed this issue." *Ibid.*

The panel also rejected petitioners' contention that the designation of Unit 1 as critical habitat would exceed the permissible bounds of federal authority under the Commerce Clause. The panel reasoned that designating critical habitat is "an essential part of the ESA's economic regulatory scheme," which petitioners did not otherwise challenge. Pet. App. 41a, 43a. The panel rejected petitioners' suggestion that the particular application of the ESA to Unit 1 was unconstitutional, explaining that, under *Gonzales* v. *Raich*, 545 U.S. 1, 23 (2005), "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." Pet. App. 43a (quoting *id.* at 101a) (brackets in original).

Judge Owen dissented. In her view, the Service had not shown that Unit 1 was "essential for the conservation" of the frog because the area currently "plays no part in the conservation of that species," Pet. App. 48a, and because there was "no reasonable probability that it could actually be used for conservation," *id.* at 61a.

b. Petitioners sought rehearing en banc, which was denied. Pet. App. 123a-124a. Judge Jones, joined by five other judges, dissented from the denial of rehearing. *Id.* at 124a-162a. Judge Jones disagreed with the panel's ruling that the Service's designation of Unit 1 as critical habitat was a reasonable application of the ESA, *id.* at 124a-156a, as well as with the panel's conclusion that the Service's decision not to exclude Unit 1 on economic-impact grounds was committed to agency discretion, *id.* at 156a-162a.

ARGUMENT

Petitioners renew their contentions (Weyerhaeuser Pet. 15-31; Markle Pet. 18-29) that the Fish and Wildlife Service acted unlawfully by including a portion of their lands within its designation of critical habitat for the endangered dusky gopher frog. The court of appeals correctly upheld the Service's determination, based upon the administrative record, that Unit 1 is "essential for the conservation of the species," 16 U.S.C. 1532(5)(A)(ii), and also properly declined to disturb the Service's discretionary decision not to exclude Unit 1 on economic-impact grounds. Those rulings do not conflict with any decision of this Court or of any other court of appeals, and the Service's factbound determination of critical habitat does not warrant this Court's review.

1. a. The ESA directs the Service, when listing a species as endangered or threatened, also to designate the species' critical habitat. 16 U.S.C. 1533(a)(3)(A)(i). The ESA directs the Service to make that designation of critical habitat "on the basis of the best scientific data available," while also taking into consideration economic and other impacts. 16 U.S.C. 1533(b)(2).

The statutory standard for designating an area as critical habitat differs between occupied and unoccupied areas. For areas "*within* the geographical area occupied by the species" at the time of listing, an area may be designated as critical habitat so long as it contains "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i) (emphasis added). For areas "*outside* the geographical area occupied by the species" at the time of listing, however, an area cannot qualify as critical habitat simply by containing those "physical or

biological features." 16 U.S.C. 1532(5)(A)(i)-(ii) (emphasis added). Instead, such areas may be designated as critical habitat only "upon a determination by the Secretary" that the areas themselves "are essential for the conservation of the species." *Ibid.* Moreover, under the regulations applicable here, a designation of unoccupied critical habitat could not be made unless the Service determined that "a designation limited to [a species'] present range would be inadequate to ensure the conservation of the species." 50 C.F.R. 424.12(e) (2012).

Based upon the extensive administrative record, the Service concluded that limiting the critical-habitat designation to occupied habitat would be "inadequate to ensure the conservation of" the dusky gopher frog, 77 Fed. Reg. at 35,128, and further determined that Unit 1 is "essential for the conservation of the species," *id.* at 35,123, 35,135. The Service's decision is reviewable under the APA, and thus may be set aside only if arbitrary or capricious or otherwise contrary to law. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 658 (2007). Courts review an agency's scientific judgments with particular deference. See, *e.g.*, *Baltimore Gas & Elec. Co.* v. *Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."). And because "Congress has not defined the word

'essential' in the ESA," the Service in designating critical habitat by regulation has the "authority to interpret the term" within the bounds of *Chevron*. Pet. App. 21a.

The court of appeals properly upheld the Service's determination that Unit 1 is "essential for the conservation of the [dusky gopher frog]" within the meaning of 16 U.S.C. 1532(5)(A)(ii).[5] In concluding that "the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA" under *Chevron*, Pet. App. 32a; see *id.* at 15a, 22a, the court of appeals properly accounted for the full range of relevant considerations.

First, as the court of appeals explained, the Service properly determined—and petitioners do not dispute—that a designation of critical habitat limited to the areas occupied by the dusky gopher frog at the time it was listed as endangered would be "inadequate to ensure the conservation of the species." Pet. App. 16a-17a (emphasis omitted) (quoting 50 C.F.R. 424.12(e) (2012)).[6]

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[5] Petitioners in No. 17-74 mistakenly assert (Markle Pet. 4) that "under the Fifth Circuit decision[,] the government's designation of critical habitat is unreviewable in a court of law." To the contrary, the court of appeals reviewed the designation of Unit 1 and upheld that action on its merits.

[6] Petitioner in No. 17-71 notes (Weyerhaeuser Pet. 30-31) that, in 2016, the Service rescinded the regulation requiring a threshold "inadequa[cy]" determination before unoccupied critical habitat may be considered for designation. See 81 Fed. Reg. 7414 (Feb. 11, 2016). That regulatory change has been challenged in litigation by 20 States and various private groups, and the suits have repeatedly been stayed to afford the parties an opportunity to evaluate the potential resolution of the claims. See *Alabama* v. *National Marine Fisheries Serv.*, 16-cv-593 Docket entry No. 52 (S.D. Ala. Nov. 13, 2017) (staying case through Feb. 8, 2018); *Utility Water Act Grp.* v. *National Marine Fisheries Serv.*, 17-cv-206 Docket entry No. 24 (S.D. Ala. Sept. 14, 2017) (staying case through Nov. 20, 2017).

When the frog was listed in 2001, "only about 100 adult frogs [were] known to exist in the wild," *id.* at 3a, all at a single pond in Mississippi. Even after the Service proposed a designation that included both occupied and unoccupied areas within Mississippi, the "consensus expert conclusion" was that the designation remained inadequate to ensure the frog's recovery, particularly given the risk that "local events, such as drought and other environmental disasters," could cause the species' extinction. *Id.* at 17a. Scientific reviewers specifically "urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range." *Ibid.* The court thus observed that "recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 18a-19a (citation omitted).

Second, in reviewing the Service's determination, the court of appeals appropriately recognized the frog's unusual breeding needs. The court observed that the Service "focused its resources on locating additional ephemeral ponds" because of "their rarity and great importance for breeding, and because they are very difficult to replicate artificially." Pet. App. 18a. The Service gave particular attention to Unit 1 because it still possessed the rare kind of "isolated, ephemeral ponds" required by the frog for breeding. *Id.* at 19a. Other historic breeding sites, such as "[t]he area in Alabama where the frog once lived," no longer possessed those characteristics. *Ibid.* In fact, as the court noted, "the

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These actions do not affect the Service's designation of critical habitat for the dusky gopher frog, and recent (or any future) regulatory changes demonstrate only that the legal regime applied in this case may be of reduced prospective importance.

five ponds in Unit 1 provide breeding habitat" for the frog "that in its totality is not known to be present" anywhere else "within [its] historic range." *Ibid.* (citation omitted). And although ensuring the long-term success of the frog, if translocated to Unit 1, would likely require modifications to the surrounding uplands, the court correctly noted the Service's finding (not disputed by petitioners) that such modifications to the terrestrial habitat were readily feasible. *Id.* at 26a n.17. The court thus found reasonable the Service's conclusion that "the unique ponds located on Unit 1 are essential for the frog's recovery." *Id.* at 20a (citation omitted).

Third, the court of appeals properly declined to give dispositive significance to petitioners' assertions of unwillingness to participate in conservation of the dusky gopher frog. See Pet. App. 24a. As the court explained, petitioners' suggestion that a landowner's opposition to designation of unoccupied critical habitat suffices to defeat the designation "lacks legal support and is undermined by the ESA's text." *Ibid.* Nor does the ESA "set[] a[ny] deadline for achieving th[e] ultimate conservation goal," *id.* at 25a, or require the exclusion of areas from critical habitat simply because the designation in itself would not guarantee the species' recovery.

At the same time, the court of appeals appropriately cautioned that its decision did not permit the arbitrary or indiscriminate designation of unoccupied private lands as critical habitat. The court specifically rejected a "generalized rule" that "the Service can designate any land as critical" so long as it "contains a single one of the 'physical or biological features' essential to the conservation of the species at issue." Pet. App. 30a n.20 (citation omitted). The court held only that "*in this*

case" there was "substantial, consensus, scientific evidence" to support the Service's reasonable determination that Unit 1 is "essential" for the conservation of the frog, particularly in light of the "scientific consensus that the rarity of isolated, ephemeral ponds 'is a limiting factor in dusky gopher frog recovery.'" *Ibid.* (citation omitted); see also, *e.g.*, *id.* at 22a-23a n.15, 29a (similar). The court thus rejected the dissent's effort to "decouple the Service's 'essentiality' finding" from the administrative record compiled in this case. *Id.* at 31a n.20; see also *ibid.* (emphasizing that "the ESA specifically requires that critical habitat determinations be based on 'scientific data'") (quoting 16 U.S.C. 1533(b)(2)).

b. Petitioners' arguments do not identify any error in the court of appeals' decision.

Petitioners principally contend (Weyerhaeuser Pet. 15-16; Markle Pet. 18-22) that Unit 1 does not constitute "habitat" for the dusky gopher frog. Adopting a statutory argument offered by the dissent from denial of rehearing, petitioners assert that because the ESA directs the Service to "designate *any habitat* of such species which is then considered to be critical habitat," 16 U.S.C. 1533(a)(3)(A)(i) (emphasis added), the Service cannot designate an area as "critical habitat" unless that area first qualifies as "habitat."

As an initial matter, although petitioners raised this argument in district court (Weyerhaeuser Pet. 15 n.5), they did not present it to the court of appeals. Petitioners contested the Service's determination that Unit 1 is "essential for the conservation of the species" under Section 1532(5)(A)(ii), not any finding that Unit 1 constituted "habitat" under Section 1533(a)(3)(A)(i). The panel decision accordingly did not address the latter argument, as petitioners acknowledge. See, *e.g.*, Markle

Pet. 22. The dissent from denial of rehearing similarly observed that "the parties, for differing tactical reasons, did not call" this argument to the panel's attention. Pet. App. 138a (Jones, J.). Petitioners thus ask this Court to resolve arguments that the court of appeals did not address and was given no occasion to consider. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is "[one] of review, not of first view").

In any event, petitioners' argument misunderstands the significance of the term "habitat." For an area to fall within a species' "habitat," the species need not currently inhabit the area. The text of the ESA demonstrates as much: an area may qualify not only as "habitat," but as "*critical* habitat," even if the area lies "*outside* the geographical area occupied by the species at the time it is listed." 16 U.S.C. 1632(5)(A)(ii) (emphasis added).

Petitioners' related assertions (Weyerhaeuser Pet. 14-16; Markle Pet. 18-20) that Unit 1 is not "habitat" because the dusky gopher frog could not "live and grow" there rest on similar misunderstandings of both the law and the factual record. As a legal matter, petitioners rely on the observation (Weyerhaeuser Pet. 2; Markle Pet. 25) that Unit 1 does not currently contain "[a]ll three" of the "'primary constituent elements' ('PCEs') of frog habitat" that the Service previously identified as essential to the frog's conservation. But the three "PCEs" identified by the Service for the dusky gopher frog relate to the "physical or biological features" referred to in 16 U.S.C. 1532(5)(A)(i). Those features are the requirements of *occupied critical habitat*, not requirements of "habitat" itself. Petitioners' arguments erroneously conflate the distinct concepts of "habitat" and "critical habitat," while further overlooking that

Unit 1 was designated as unoccupied rather than occupied critical habitat.

Moreover, as a factual matter, the Service never concluded that Unit 1 is not "habitat" or is "uninhabitable" by the frog. Cf. Weyerhaeuser Pet. 16 (mistakenly declaring it "undisputed" that Unit 1 is not "habitat"); Markle Pet. 33 (same). To the contrary, the Service declared that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere" in the frog's "historic range." 77 Fed. Reg. at 35,124. The Service also found that the "surrounding uplands" were "poor-quality terrestrial habitat." *Id.* at 35,133. But that statement reflects only that the "terrestrial habitat" would require improvements to ensure long-term success. Indeed, the Service elsewhere clarified that its finding was that "the uplands [of Unit 1] do not currently contain the essential physical or biological features of [occupied] critical habitat," *id.* at 35,135, not that the uplands failed to constitute "habitat" at all. Indeed, the Service's final rule elsewhere reflects the principle that an area may constitute "habitat" and nonetheless still require or benefit from "restor[ation]" as part of a species' conservation. See, *e.g.*, *id.* at 35,133 ("[W]e searched for *additional habitat* with the best potential of restoring the physical and biological features essential for the conservation of the dusky gopher frog.") (emphasis added).

Petitioners' renewal (Weyerhaeuser Pet. 17-18; Markle Pet. 22-23) of their argument presented below—that the Service's designation was unlawful because Unit 1, in its present form, cannot be "essential for the conservation of the species" under Section 1532(5)(A)(ii)—is similarly without merit. As explained (pp. 18-21, *supra*), the court of appeals carefully reviewed the record

and properly upheld the Service's determination that Unit 1 was essential for the frog's conservation. Petitioners nowhere identify any provision in the ESA specifying that an area cannot be deemed "essential to [a species'] conservation" just because it may require reasonable modifications to fully benefit the species. On the contrary, "conservation" itself includes "the use of all methods and procedures" necessary to achieve the recovery of the species, including human-assisted habitat management. 16 U.S.C. 1532(3). The Service may conclude in an appropriate case that an area is "essential" for "conservation" even if reasonable restorations would be undertaken as part of that conservation. And, as the courts below noted, petitioners at no time challenged the factual and scientific findings underpinning the Service's judgment that Unit 1 is "essential for the conservation of the frog." See Pet. App. 17a, 20a-21a, 106a.[7]

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[7] Petitioner's assertion (Weyerhaeuser Pet. 29) that the Service's designation of Unit 1 reflects an "expansionary zeal to reach unoccupied non-habitat" is belied by the cautious, measured, and scientific approach taken by the Service throughout the designation process. See, *e.g.*, 77 Fed. Reg. at 35,123-35,124 (noting that Unit 1 was designated only after "scientific peer reviewers" were "united in their assessment" that the original proposal was "inadequate"); *id.* at 35,124 (declining to designate critical habitat in Alabama, despite suggestions of commenters, because available sites in Alabama could not be deemed "essential for the [frog's] conservation"); *id.* at 35,120 (declining to increase the "radius" of critical habitat around breeding ponds and rejecting use of data that were "skewed toward larger values" and would produce "possible bias" in favor of larger designations). As noted, petitioners have declined to challenge any of the Service's scientific judgments. To the extent petitioners identify "substantial scientific information" demonstrating that "revision [of the critical-habitat designation]

Petitioners' protestation that Unit 1 is not suited in all respects for immediate occupation by the frog also overlooks the substantial practical challenges inherent in the identification of critical habitat for endangered species. Many species are endangered precisely because their ideal habitat has been severely diminished or eliminated altogether. The district court properly credited the Service's observation that "it does not make sense to hamstring [the Service's] efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species," for "[i]f such habitat was readily available, the frog would not be reduced to 100 individuals." Pet. App. 108a n.28. And where optimal habitat is unavailable, the Service acts appropriately in prioritizing areas with those features that are rarest or most difficult to reproduce through human intervention—here, the unique ephemeral ponds necessary for the frog's breeding—while ensuring that any deficiencies in those areas could be addressed with "reasonable effort." 77 Fed. Reg. at 35,135. And though petitioners assert (Markle Pet. 10) that Unit 1 is "curiously distant and isolated from" other units designated as critical habitat, the record reflects that Unit 1 was selected in part precisely because it could "provide[] a refuge for the frog should the other sites be negatively affected by environmental threats or catastrophic events." *Id.* at 35,124.

Finally, petitioners' assertions (Weyerhaeuser Pet. 29-30; Markle Pet. 4, 16-17, 34) that the court of appeals' decision "bestows 'virtually limitless' authority" on the Service to designate "vast portions of the United States" as "critical habitat" are plainly incorrect. The

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may be warranted," however, petitioners may petition the Service at any time to revise its designation. See 16 U.S.C. 1533(b)(3)(D)(i).

court emphasized the "meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat," Pet. App. 31a, and as explained (see pp. 20-21, *supra*), the court expressly disclaimed the broad legal holding that the dissenting judges (and now petitioners) sought to attribute to its decision. Petitioners' arguments in the end amount to a challenge to the court's factbound conclusion that the record in this case was sufficient to support the Service's determination that Unit 1 meets the statutory standard for designation of unoccupied critical habitat.

c. The court of appeals' decision does not conflict with the decision of any other court of appeals. Petitioners note that the Ninth Circuit has characterized the standard for designating unoccupied critical habitat as "more demanding" (Weyerhaeuser Pet. 25) or "more onerous" (Markle Pet. 28) than the standard for occupied critical habitat. But the court of appeals in this case nowhere stated that it was "impos[ing] a *lower* standard on the designation of unoccupied critical habitat" (Weyerhaeuser Pet. 24), and petitioners cannot show that the Ninth Circuit's observation translates into any substantive difference in the interpretation of the ESA's provisions governing critical habitat.

The cited decisions did not involve the designation of unoccupied critical habitat, much less demonstrate that the Ninth Circuit would reach a different result on the facts of this case. *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160 (2010), cert. denied, 562 U.S. 1216 (2011), involved a challenge to the designation of critical habitat for a species of owl. The plaintiffs argued that the Service improperly treated unoccupied areas as oc-

cupied habitat in order to avoid making the findings required for unoccupied critical habitat. *Id.* at 1163. The Ninth Circuit acknowledged that designating unoccupied critical habitat would have involved a "more onerous procedure," inasmuch as it would have "requir[ed] the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Ibid.* But the court found that the Service properly treated the habitat in question as occupied. See *ibid.* ("We conclude that the [Service] permissibly interpreted the word 'occupied' in the ESA to include areas where the owl was likely to be present and that, applying this definition, the FWS designated only 'occupied' areas.").

Similarly, in *Home Builders Ass'n of Northern California* v. *United States Fish & Wildlife Service*, 616 F.3d 983 (2010), cert. denied, 562 U.S. 1217 (2011), the Ninth Circuit upheld the Service's designation of occupied critical habitat for several listed species in California. In response to the plaintiffs' contention that the designation encompassed some unoccupied habitat, the court noted its prior statement in *Arizona Cattle Growers* that any designation of unoccupied critical habitat would be subject to a "more demanding standard." *Id.* at 990. But the court found that even if some unoccupied habitat had been included, the Service's findings satisfied the necessary standard. *Ibid.* And nothing in the court's decision suggested that the "more demanding standard" it applied—a particularized determination that the unoccupied area was "[e]ssential for conservation," *ibid.*—was any different from the standard applied by the Service and the court of appeals here.[8]

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[8] The district-court decisions cited by petitioner Weyerhaeuser (Pet. 25) similarly do not articulate any substantive legal standard that differs from the standard applied by the court below.

2. a. The court of appeals also properly declined to review the Service's discretionary decision not to exclude Unit 1 from its critical-habitat designation. Pet. App. 32a-35a. The ESA provides that, in designating "critical habitat," the Service is to "tak[e] into consideration the economic impact * * * of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The statute then provides that the Service "*may* exclude any area from critical habitat" if it "determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.* (emphasis added). But, aside from withdrawing the Service's discretion to exclude an area where "failure to designate such area as critical habitat will result in the extinction of the species concerned," *ibid.*, the statute nowhere specifies that the Service must exercise its discretion in any particular manner.

By permitting, but not requiring, the Service to exclude areas from critical habitat based on its impact analysis, the statute affords "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). The court of appeals' conclusion that the Service's authority to exclude an area from a critical-habitat designation under Section 1533(b)(2) is committed to agency discretion by law, see 5 U.S.C. 701(a)(2), is consistent not only with the decisions of "[t]he only other circuit court that has confronted" the question, but also with "every district court that has addressed this issue." Pet. App. 34a; see *Bear Valley Mut. Water Co.* v. *Jewell*, 790 F.3d 977, 989-990 (9th Cir. 2015) (concluding that "an agency's decision not to exclude critical habitat is unreviewable" because the ESA "cannot be read to say that the FWS is ever obligated to exclude habitat that it has found to

be essential"), cert. denied, 136 S. Ct. 799 (2016); *Building Indus. Ass'n of the Bay Area* v. *United States Dep't of Commerce*, 792 F.3d 1027, 1035 (9th Cir. 2015) (reaffirming *Bear Valley*), cert. denied, 137 S. Ct. 328 (2016). This Court denied review on that question in *Building Industry Ass'n*, and the same course is warranted here.

b. Petitioner in No. 17-71 challenges the court of appeals' reviewability holding (Weyerhaeuser Pet. 31-33), but its arguments do not warrant this Court's consideration.[9] Petitioner urges that the court of appeals' holding "flies in the face of the 'strong presumption favoring judicial review of administrative action,'" *id.* at 32 (quoting *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015)), but it fails to identify any basis upon which a court could review the Service's discretionary decision not to exclude an area on grounds of economic impact. Indeed, the Ninth Circuit's decision in *Building Industry Ass'n*, cited by the court of appeals below, agreed with petitioner's suggestion that "the preclusion of judicial review 'is not to be lightly inferred,'" 792 F.3d at 1035 (quoting *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970)), but nonetheless concluded that "Congress intended [the Service's] action to be unreviewable" because it did not impose any "standards for when areas *must* be excluded from designation," *ibid.*

Petitioner's assertion that the court of appeals' decision conflicts with *Bennett* v. *Spear*, 520 U.S. 154 (1997), is similarly unavailing. The relevant question in *Ben-*

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[9] Petitioners in No. 17-74 express disagreement with the court of appeals' holding (Markle Pet. 29-32), but fail to identify the issue as a question presented (cf. *id.* at i). Accordingly, this question is presented only in No. 17-71. See Sup. Ct. R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

nett was whether the plaintiffs' claims could proceed under the citizen-suit provision of the ESA, which authorizes persons to commence a civil suit "where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary." 16 U.S.C. 1540(g)(1). The Court found a "duty * * * which is not discretionary" in the first sentence of Section 1533(b)(2), which directs that "[t]he Secretary *shall* designate critical habitat * * * on the basis of the best scientific data available and after taking into consideration the economic impact * * * of specifying any particular area as critical habitat." *Bennett*, 520 U.S. at 172 (quoting 16 U.S.C. 1533(b)(2)). It therefore allowed the plaintiffs to proceed on their claim that the Secretary had failed to meet that procedural requirement.

Petitioners note (Weyerhaeuser Pet. 32; Markle Pet. 31) that, in the course of that reasoning, *Bennett* stated that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion" did not "alter the categorical *requirement* that, in arriving at his decision," he must take economic impacts into consideration and use the best scientific data available. 520 U.S. at 172; see also *ibid.* ("[D]iscretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking."). But petitioners here do not allege that the Service failed to consider a mandatory factor or ignored "required procedures." *Ibid.* And *Bennett*'s assumption that the Secretary's ultimate decision whether to exclude an area would be "reviewable only for abuse of discretion" was a passing *dictum*; the Secretary made no decision concerning exclusion in that case, and no party contended or conceded that any such determination would be reviewable if made. Cf., *e.g.*, *Central Va. Cmty. Coll.* v.

Katz, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

3. Petitioners' constitutionally grounded arguments also do not warrant review. Petitioners in No. 17-74 claim to seek review of whether, if the Service's designation was authorized by statute, "the U.S. Constitution allow[s] such a designation" (Markle Pet. i).[10] But the body of their petition does not argue that the Service's application of the ESA was, in fact, unconstitutional. To the contrary, petitioners contend (*id.* at 39) that "[t]o *avoid needlessly reaching* these constitutional issues" (emphasis added), this Court should grant review on the statutory question and construe the text of the ESA to foreclose the Service's designation. The asserted constitutional question in No. 17-74 thus carries no independent content for this Court's review.

Petitioners' constitutional arguments below were not meaningfully more developed. In the court of appeals, petitioners "concede[d]" that the "critical-habitat provision of the ESA," properly interpreted, "is a constitutional exercise of Congress's Commerce Clause authority." Pet. App. 37a; see also *id.* at 38a (acknowledging petitioners' concession that "the critical-habitat provision of the ESA is 'within the legitimate powers of Congress'"). The court concluded that this "concession truncate[d] [the] analysis" of petitioners' constitutional arguments. *Id.* at 44a n.23. The court understood petitioners to argue only that "the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the

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[10] Petitioner in No. 17-71 does not seek this Court's review of any constitutional question (Weyerhaeuser Pet. i), although it urges this Court to interpret the ESA to "avoid constitutional doubts" under the Commerce Clause (*id.* at 21-23).

scope of an otherwise constitutional power," on the theory that the "designation of Unit 1" was an impermissible "*intra*state (not *inter*state) activity." *Id.* at 37a. The court rejected that argument, concluding that even assuming the Service's designation constituted intrastate activity, such "intrastate activity can be regulated if it is 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 39a-40a (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 36 (2005)). The court concluded (without any dissent) that that test was satisfied here, inasmuch as it reasoned that "the ESA is an economic regulatory scheme" and that "designating critical habitat is an essential part of the ESA's economic regulatory scheme." *Id.* at 40a-41a.

That decision would not warrant this Court's review even if petitioners had preserved their arguments, because there is no circuit split on the question. Rather, as the court of appeals noted, "[e]very other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power." Pet. App. 42a; see *People for Ethical Treatment of Prop. Owners* v. *United States Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017), petition for cert. pending, No. 17-465 (filed Sept. 26, 2017); *San Luis & Delta-Mendota Water Auth.* v. *Salazar*, 638 F.3d 1163, 1177 (9th Cir.), cert. denied, 565 U.S. 1009 (2011); *Alabama-Tombigbee Rivers Coal.* v. *Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007), cert. denied, 552 U.S. 1097 (2008); *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Gibbs* v. *Babbitt*, 214 F.3d 483, 497-498 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001).

This case would be a poor vehicle for considering the extent of Congress's Commerce Clause authority in any event because the exercise of authority at issue here is not the direct regulation of petitioners' conduct, but rather, the requirement that a federal agency "insure that any action authorized, funded, or carried out *by such agency* * * * is not likely to * * * result in the destruction or adverse modification" of a listed species' designated critical habitat. 16 U.S.C. 1536(a)(2) (emphasis added). Cf., *e.g.*, Markle Pet. 12-13 (recognizing that any economic impacts to petitioners would arise only "in the event of a Section 7 consultation"). Quite apart from the Commerce Clause, Congress has constitutional authority to direct Executive Branch agencies to conduct their own activities in ways that are protective of listed species. In all events, because it is not yet apparent that any Section 7 consultation will be triggered—or, if triggered, what the results of that consultation would be—it would be premature to consider here whether hypothetical future restrictions on the development of Unit 1, formulated through the consultation process, would exceed Congress's enumerated powers.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2017

No. 17-71, 17-74

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

U.S. FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

MARKLE INTERESTS, LLC, *et al.*,

Petitioners,

v.

U.S. FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

INTERVENOR-RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the U.S. Fish and Wildlife Service's fact-specific exercise of its scientific expertise in designating "critical habitat" for dusky gopher frogs under the Endangered Species Act.

RULE 29.6 STATEMENT

Intervenor-Respondents the Center for Biological Diversity and Gulf Restoration Network are nonprofit organizations that have no parent corporations, and no publicly-held company has any ownership interest in them.

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INTRODUCTION

Petitioners seek review of the Fifth Circuit's decision upholding the U.S. Fish and Wildlife Service's ("FWS") rule designating critical habitat under the Endangered Species Act ("ESA") for highly endangered dusky gopher frogs. But Petitioners offer no convincing reason why the Court should delve into the administrative record to examine such a fact-specific issue dependent on the agency's exercise of its scientific expertise. The Fifth Circuit's decision does not conflict with a decision from any other Circuit or this Court. And its record-based, narrow decision reflects the correct application of the relevant statutory standards and deferential standard of review.

Petitioners assert that their economic interests in a two-and-a-half square mile area designated as critical habitat for the frog in St. Tammany Parish, Louisiana, outweigh the benefits for the frog. Yet even if that were true (which it is not), FWS did the requisite economic analysis, and nothing in the ESA requires FWS to exclude lands from the critical habitat designation for economic considerations. Indeed, every court that has examined the issue has found that the agency's decision not to exclude land is committed to agency discretion and unreviewable.

Nor has any appellate court ever found that an agency rule promulgated under the ESA exceeded authority under the Commerce Clause. Petitioners' arguments to the contrary have already been rejected by six different circuits and offer no need for this Court to

examine the issue. Petitioners' arguments under the Tenth Amendment similarly provide no reason for review, as they never raised these baseless arguments in the proceedings below.

At bottom, Petitioners' and Amici's requests reflect little more than their policy disagreement with the ESA and its mandate that FWS designate critical habitat for listed species. They ignore the benefits of the frog's critical habitat designation, and their claims regarding the economic impact of the designation have no basis in reality. Their policy disagreements with the designation do not raise any significant issue requiring the Court's review.

STATEMENT OF THE CASE

I. The ESA Mandates Critical Habitat Designations Based on the Best Available Science

As this Court has recognized, the ESA represents "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The primary purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . ." 16 U.S.C. § 1531(b).

"Conservation" means the "use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at

which the measures provided pursuant to [the ESA] are no longer necessary." *Id.* § 1532(3). The ESA's goal is thus to recover endangered and threatened species.

To that end, Section 4 requires FWS to list threatened and endangered species and to timely designate critical habitat for listed species "on the basis of the best scientific data available." *Id.* §§ 1533(a)(1), (a)(3)(A)(i), (b)(1)-(2).

The ESA defines critical habitat as:

> (i) the specific areas within the geographical area *occupied* by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas *outside the geographical area occupied by the species* at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A) (emphasis added). At the time of the designation at issue in this litigation, FWS identified essential "features" – required for designation of occupied habitat but not unoccupied habitat – by focusing on their "primary constituent elements" or "PCEs."

Contrary to the suggestions of Petitioners and Amici, designation of critical habitat does not involve

setting aside preserves for listed species and does not prohibit, or even regulate, non-federal actions. *See, e.g.*, Weyerhaeuser Pet. 20 (criticizing the designation for "impos[ing] all the costs for creating a new frog preserve on private landowners"). The primary consequences of critical habitat occur when federal agencies must consult with FWS to ensure that the actions those agencies authorize, fund, or carry out are not likely to result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). Thus, critical habitat designations have legal effect only in connection with some other subsequent federal action. *Id.*

II. Natural History of the Dusky Gopher Frog

This case concerns the critical habitat designation for the dusky gopher frog (*Rana sevosa*). This highly endangered frog lives underground in pine forests (historically those dominated by longleaf pine) and breeds in small ephemeral ponds that lack fish. 66 Fed. Reg. 62,993, 62,994 (Dec. 4, 2001). The frog survives in just three small, isolated populations in Harrison and Jackson counties in southern Mississippi, with only one pond regularly showing reproduction by the frog. 77 Fed. Reg. 35,118, 35,136 (June 12, 2012).

When the dusky gopher frog was listed as an endangered species, only about 100 adult frogs existed in the wild. 66 Fed. Reg. at 62,995. The frog is primarily threatened by habitat loss and disease. *Id.* at 62,997-63,000. Its small numbers also make it highly

susceptible to genetic isolation, inbreeding, and random demographic or human related events. *Id.* at 62,999.

III. Protection of the Dusky Gopher Frog under the Endangered Species Act and Required Critical Habitat Designation

In response to litigation from the Center for Biological Diversity, FWS listed the dusky gopher frog (then known as the Mississippi gopher frog) as an endangered species in December 2001. *Id.* at 62,993. Nearly a decade later, in 2010, the Center's litigation prompted FWS to propose designation of 1,957 acres of critical habitat for the frog. 75 Fed. Reg. 31,387 (June 3, 2010).

FWS subjected the 2010 proposed rule to public comment and peer review by frog experts. Every peer reviewer concluded that the amount of habitat proposed in 2010 was insufficient for the conservation of the species, with several suggesting that FWS consider other locations within the frog's historical habitat. 76 Fed. Reg. 59,774, 59,776 (Sept. 27, 2011); *see, e.g.*, ROA.1568[1] (comments from Joseph Pechmann, Associate Professor, Western Carolina University, expert on the dusky gopher frog, explaining: "I believe that it is

[1] "ROA" refers to the Record on Appeal, and these documents are included in the Record Excerpts of Defendant Intervenor-Appellees filed with the court of appeals on January 5, 2015 (Document No. 00512888581).

essential for the conservation of the species to designate critical habitat in Louisiana, and in Alabama if possible. . . .").

Comments from the peer reviewers and others, including the Center, led FWS to revise the proposed critical habitat designation. 77 Fed. Reg. 2254, 2255 (Jan. 17, 2012). The final rule designates approximately 1,544 acres in St. Tammany Parish, Louisiana ("Unit 1"), and approximately 4,933 acres in Forrest, Harrison, Jackson, and Perry counties, Mississippi. In total, approximately 6,477 acres are designated as critical habitat for the dusky gopher frog, all within its historical habitat. 77 Fed. Reg. 35,118.

Unit 1, at issue here, consists of privately owned land currently used for timber production purposes but containing a concentration of the extremely rare ephemeral ponds on which the frog depends. 77 Fed. Reg. at 35,132. Applying its scientific expertise, FWS found that Unit 1 is essential for the conservation of the frog:

> Unit 1 consists of five ponds (ephemeral wetland habitat) and their associated uplands. If dusky gopher frogs are translocated to the site, the five ponds are in close enough proximity to each other that adult frogs could move between them and create a metapopulation, which increases the chances of the long-term survival of the population. Although the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe

> them to be restorable with reasonable effort. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species is at high risk of extirpation from stochastic events, such as disease or drought. Maintaining the five ponds within this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. Therefore, we have determined this unit is essential for the conservation of the species because it provides important breeding sites for recovery. It includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog.

77 Fed. Reg. at 35,135; *see also id.* at 35,132 ("We focused on the identification of ephemeral wetland habitats in our analysis because they are requisite sites for population survival and conservation and their rarity in the environment is one of the primary reasons that the frog is endangered."); *id.* at 35,133 ("[N]o group of five ponds such as these was found in any of the areas of historical occurrence that we have searched in Mississippi.").

When promulgating a final rule designating critical habitat for a listed species, FWS must "tak[e] into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as

critical habitat" and "may" exclude an area from designated critical habitat based on economic impacts. 16 U.S.C. § 1533(b)(2). Here, FWS analyzed the economic impact of the critical habitat designation on the private land in Unit 1 and considered a range of possible impacts.

Specifically, FWS concluded that Petitioners would experience *no* economic impacts if they continued to use the land as pine plantations, which do not implicate any federal actions that would require an agency to consult with FWS to avoid destruction or adverse modification of critical habitat. If, however, Petitioners sought to develop the property for residential or other uses, economic impacts would be likely only if (1) the development involved dredging of or discharges of fill to the ephemeral ponds; and (2) those ponds were federal-jurisdictional wetlands subject to Clean Water Act permitting requirements (an issue that FWS did not purport to decide). U.S. FISH & WILDLIFE SERV., ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATION FOR THE DUSKY GOPHER FROG ES-5 (2012) (hereinafter "Economic Analysis"), https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. If the property's development required such a permit, FWS estimated that the economic impact of the designation could amount to approximately $20 million if, upon consultation, FWS recommended that a permit be conditioned on the landowners' agreement to manage a portion of the property for conservation of the frog. *Id.*; *see also* 77 Fed. Reg. at 35,140-41. In the "worst case scenario" for Petitioners, FWS would recommend

avoidance of any development of Unit 1 that would require a permit, which would allow continued use of the property for forestry and hunting purposes but result in lost development value of $33.9 million over 20 years. *See* Economic Analysis at ES-5 – ES-6; 77 Fed. Reg. at 35,141.

Given the uncertainty of any potential economic impacts, FWS determined that no "disproportionate costs" were likely to result from the designation. FWS determined that the designation would have significant benefits, though it did not attempt to monetize those benefits. Accordingly, FWS did not exercise its discretion to exclude Unit 1. 77 Fed. Reg. at 35,141.

In all, the final critical habitat designation was the culmination of two proposed rules; an economic analysis; two rounds of notice and comment; a scientific peer-review process, including responses from six experts; and a public hearing. *See id.* at 35,119.

IV. The Litigation Below

Markle Interests, LLC; P&F Lumber Company 2000, LLC; PF Monroe Properties, LLC; and Weyerhaeuser Company ("Petitioners") filed three separate lawsuits challenging the frog's critical habitat designation on statutory and constitutional grounds. The lawsuits were consolidated before the district court. The district court granted leave to intervene, of right, to the Center for Biological Diversity and Gulf Restoration Network (the "Center").

On August 22, 2014, the district court upheld the critical habitat designation in its entirety and entered final judgment against Petitioners on the merits. *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748 (E.D. La. 2014); Markle Pet. App. B-2.

Petitioners timely filed separate Notices of Appeal, and the Fifth Circuit consolidated the appeals. The panel, in a 2-1 decision dated June 30, 2016, affirmed the district court in its entirety. The court of appeals rejected Petitioners' argument that unoccupied critical habitat must be "currently habitable" because Petitioners' "proposed extra-textual limit on the designation of unoccupied habitat – habitability – effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land." Markle Pet. App. A-25. The court of appeals held that FWS's power to designate critical habitat has "meaningful limits" because the ESA requires FWS to base its finding of essentiality on the "best scientific data available." *Id.* at A-32 – A-33, citing 16 U.S.C. § 1533(b)(2). It reasoned that the designation of Unit 1 "was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand." Markle Pet. App. A-32. As for Petitioners' pleas for a "private landowner exemption" from critical habitat designations, the court of appeals explained that Petitioners' policy concerns should be brought to Congress, not the courts. *Id.* at A-29.

In addition, the court of appeals concluded that FWS's decision to not exclude Unit 1 is unreviewable. Because the "statute is silent on a standard for reviewing the Service's decision to *not* exclude an area," that decision is committed to agency discretion. *Id.* at A-37 (emphasis in original). The court of appeals observed that its decision in this respect was consistent with every other court decision on the issue and saw "no reason to chart a new path." *Id.*

The court of appeals further concluded that binding precedent forecloses Petitioners' argument that FWS's designation of Unit 1 is unconstitutional under the Commerce Clause. *Id.* at A-39 – A-47. It held that the critical habitat provision is an "essential component" of the ESA's regulation of economic activity "[b]ecause of the link between species survival and habitat preservation." *Id.* at A-45. Therefore, it upheld the designation under the aggregation principle, which provides that intrastate activity can be regulated if it is an essential part of a larger regulation of economic activity that has a substantial effect on interstate commerce. *Id.* at A-42. The court of appeals observed that every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *Id.* at A-44 – A-45 (citations omitted).

The Fifth Circuit subsequently denied Petitioners' request for rehearing *en banc*. Markle Pet. App. C-3.

REASONS FOR DENYING THE WRIT

I. Designation of Gopher Frog Critical Habitat was a Fact-Specific Exercise of the Agency's Scientific Expertise, Which the Court of Appeals Correctly Upheld

Petitioners dispute FWS's finding that Unit 1 satisfies the definition of critical habitat. Yet a determination of whether an area is "essential for the conservation of the species" is a highly fact-specific inquiry that is not appropriate for review by this Court. Moreover, the court of appeals correctly deferred to the agency's exercise of its scientific expertise in making this determination.

Petitioners and Amici argue that Unit 1 cannot be considered "habitat" for the frog, relying on various dictionary definitions of the word. Weyerhaeuser Pet. 16; Markle Pet. 18-19; *see, e.g.*, Br. of Chamber of Commerce 8. Petitioners did not, however, preserve that issue for review by this Court because they never made that argument before the court of appeals. *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."). Their briefing before the court of appeals focused on the meaning of "essential" and never once argued inconsistency with the meaning of "habitat."

Substantively, that argument fails too. Unit 1 undoubtedly qualifies as former or historical "habitat" for the frog under any meaning of the word, as Unit 1 is the site of the last known occurrence of the frog in

Louisiana. 77 Fed. Reg. at 35,124, 35,133. Petitioners and Amici repeatedly mischaracterize the record by asserting that Unit 1 has no connection to the frog. *See, e.g.*, Br. of San Juan, County Utah 4 ("The Service randomly found more acres for the dusky gopher frog in Louisiana.").[2] Moreover, it is the ESA, not the dictionary, that provides the appropriate test for whether Unit 1 qualifies as critical habitat. The ESA expressly defines critical habitat to include unoccupied areas, as long as the area is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

The ESA does not define "essential." Rather, FWS uses its expertise to determine whether habitat is essential on a case-by-case basis. Markle Pet. App. A-16, A-23. Here, FWS found that "[t]he dusky gopher frog is at high risk of extirpation from stochastic events, such as disease or drought, and from demographic factors such as inbreeding depression," and it found that "establishment of additional populations beyond the single site known to be occupied at listing is critical to protect the species from extinction and provide for the species' eventual recovery." 77 Fed. Reg. at 35,121. Therefore, FWS concluded that Unit 1 is "essential for the conservation of the species because it provides important breeding sites for recovery" and "includes habitat for population expansion outside of the core

[2] The frog was once found in Alabama, Mississippi, and Louisiana. 77 Fed. Reg. at 35,132, 35,134. The critical habitat designation covers 6,477 acres, which includes both current, occupied habitat and historical, unoccupied habitat designated in Mississippi, as well as the historical, unoccupied habitat designated in Louisiana. *Id.*

population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog." *Id.* at 35,135.

Based on an examination of the lengthy administrative record, the court of appeals held that FWS's finding that Unit 1 is essential was fully supported, including by frog experts outside the agency. Markle Pet. App. A-18 – A-19. For example, Dr. Joseph Pechmann from Western Carolina University, who has done extensive research on the dusky gopher frog, explained in his comments on the proposed rule: "I believe that it is essential for the conservation of the species to designate critical habitat in Louisiana, and in Alabama if possible, in addition to the habitat proposed for designation in Mississippi." ROA.1568; *see also* ROA.1588 ("I strongly agree with the Service's determination that this area is essential for the conservation of *R. sevosa*."). He identified the area where the frog was last documented in Louisiana (which FWS ultimately designated as Unit 1) and explained that it "retains the required characteristics necessary to serve as a breeding pond. . . ." ROA.1568; *see* 77 Fed. Reg. at 35,123 ("Due to the importance of ephemeral ponds to the recovery of the dusky gopher frog . . . , the Service determined that the area of Unit 1 is essential for the conservation of the dusky gopher frog. . . . Ephemeral, isolated ponds are very difficult to establish in the landscape due to their short and specific hydrology.").

Petitioners argue that Unit 1 cannot be considered "essential" because it lacks two of the PCEs or "biological features" necessary for frog survival. Weyerhaeuser Pet. 16; Markle Pet. 22-23, 25-26. But because Unit 1 is *unoccupied*, the appropriate test under the ESA is whether the entire "area" is "essential," as FWS found, not whether it contains all the essential "features" needed by the species. *Compare* 16 U.S.C. § 1532(5)(A)(ii) (criteria for designation of unoccupied critical habitat) *with id.* § 1532(5)(A)(i) (criteria for designation of occupied critical habitat); *see* Markle Pet. App. A-25 – A-26.

In seeking review from this Court, Petitioners try to contrive a conflict by pointing to case law holding that the test for unoccupied critical habitat is "more onerous" and "more demanding" than that for occupied critical habitat. Markle Pet. 27; Weyerhaeuser Pet. 24-25. Their argument is unconvincing because the court of appeals' decision is *fully consistent* with those cases. It does not matter that Unit 1 lacks two of the "essential" features because Unit 1 satisfies the standard for unoccupied habitat, which remains more rigorous because it requires that the entire "area" be essential, as FWS found. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2009) ("The statute thus differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species."); 77 Fed. Reg. at

35,135 (establishing that Unit 1 is essential "because it provides important breeding sites for recovery").

Weyerhaeuser argues that Unit 1 cannot be "essential" because the frog does not currently live there, further arguing that the ESA's definition would "have no meaningful limit" without such a "habitability requirement." Weyerhaeuser Pet. 18, 29. But again, FWS's assessment of what is "essential" for frog conservation was a highly fact-specific exercise of scientific expertise that is not an appropriate issue for review by this Court. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Moreover, nothing in the ESA requires that unoccupied critical habitat be currently "habitable." While Petitioners have invented requirements not found in the statute's plain language, the ESA itself provides appropriate limits on the agency's designation of critical habitat. FWS's exercise of its scientific expertise is limited by the ESA's requirement that designations be based on the best available science. As the court of appeals explained, "[T]he Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand." Markle Pet. App. A-32.

The court of appeals thoroughly examined the administrative record and correctly applied the statutory standard in upholding FWS's finding that Unit 1 is essential. Other than their own self-serving comments,

Petitioners cannot point to a single document – out of the hundreds in the record – that contradicts the experts' finding that Unit 1 is essential for frog conservation. No more is required for the designation to fulfill the ESA's substantive requirements.

Further review of the agency's inclusion of Unit 1 is particularly unwarranted because FWS has since amended the regulations that governed the gopher frog habitat designation. *See* 50 C.F.R. § 424.12 (2016); 81 Fed. Reg. 7414 (Feb. 11, 2016). For unoccupied critical habitat, the new regulations provide guidance not included in the previous regulations, now specifying that FWS should identify essential "specific areas" by "considering the life history, status, and conservation needs of the species based on the best available scientific data." *Compare* 50 C.F.R. § 424.12(b)(2) (2016) *with* 50 C.F.R. § 424.12(e) (2010); *see* 81 Fed. Reg. at 7434. For occupied critical habitat, the new regulations remove all references to PCEs, 50 C.F.R. § 424.12; 81 Fed. Reg. at 7431-32, and instead provide a formal definition of the statutory term "[p]hysical or biological features," 50 C.F.R. § 424.02. The new regulations have themselves been challenged as unlawful, and the court stayed that challenge through November 10, 2017. *See* Endorsed Order, *Alabama v. Nat'l Marine Fisheries Serv.*, No. 16-593 (S.D. Ala. Sept. 12, 2017), ECF No. 49 (granting Third Unopposed Motion to Continue Stay of Proceedings). That review, in combination with the changes that have already been made, substantially limits the prospective importance of the decision below,

which applied a now-superseded version of the regulations.

In summary, the court of appeals' fact-bound conclusion is correct and does not warrant this Court's review.

II. The Court of Appeals' Conclusion about Reviewability of FWS's Decision Not to Exclude Unit 1 is Correct and Does Not Conflict with Any Other Court

The court of appeals correctly concluded that FWS's decision not to exclude Unit 1 is judicially unreviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, 702, 704, because it is committed to agency discretion by law. Markle Pet. App. A-36. An agency action is committed to agency discretion by law when a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Section 4(b)(2) of the ESA gives FWS discretion to exclude an area from a critical habitat designation if it "determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). Because that sentence provides standards governing when FWS *cannot* exclude an

area from a designation (i.e., when the benefits of inclusion outweigh the benefits of exclusion or when exclusion would result in extinction of the species), decisions to exclude an area from a designation are reviewable. But Section 4(b)(2) *does not require* FWS to exercise its discretion to exclude any area and provides no standards that a court could use to judge when FWS should exercise such discretion to *not* exclude. Markle Pet. App. A-36 – A-37.

Moreover, the issue may be merely hypothetical in this case because FWS never made the requisite finding – "that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat" – that would have given it discretion to exclude Unit 1. 16 U.S.C. § 1533(b)(2). Instead, FWS merely found that its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." 77 Fed. Reg. at 35,141. Petitioners do not claim that the question of whether benefits would outweigh costs is itself a question that merits this Court's review.

Petitioners mischaracterize the law in arguing that the court of appeals' decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997). *Bennett* involved a claim that "imposition of minimum water elevations constituted an implicit determination of critical habitat" for an endangered fish that violated Section 4(b)(2) of the ESA "because it failed to take into consideration the designation's economic impact." 520 U.S. at 160. The question considered and decided in *Bennett* was whether designation

of critical habitat pursuant to Section 4(b)(2) is purely discretionary, a question the Court considered to determine whether the ESA's citizen suit provision (not the APA) applied. *Id.* at 171-72. The Supreme Court held that such a determination is not *wholly* discretionary because the first sentence of Section 4(b)(2) provides that FWS must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact. . . ." *Id.* at 172 (quoting 16 U.S.C. § 1533(b)(2)).

Because *Bennett* did not involve a claim that the agency should have excluded areas from the designation, the Court was not presented with the question of whether FWS's decision *not* to exclude is reviewable under the APA. Therefore, the *Bennett* Court's statement that the "ultimate decision" to designate critical habitat "is reviewable only for abuse of discretion," 520 U.S. at 172, does not directly speak to that question.

In any event, the court of appeals followed *Bennett* and recognized that "the ESA explicitly mandates 'consideration' of 'economic impact'" when the agency designates critical habitat. Markle Pet. App. A-38 (citing 16 U.S.C. § 1533(b)(2); *Bennett*, 520 U.S. at 172).[3] In

[3] The Amici are wrong to argue that a contradiction exists between the ESA's requirement for FWS to consider economic impacts and the discretion it provides FWS on whether to exclude specific areas. *See* Br. of Wash. Legal Found., *et al.* 18. Rather, Congress gave FWS, the expert wildlife agency charged with conservation of endangered species, the discretion to prioritize conservation and refuse to exclude certain areas essential to species survival and recovery, even if economic considerations weigh against it.

reviewing under the APA FWS's ultimate decision to designate critical habitat for the frog, the court of appeals held that FWS "fulfilled this requirement by commissioning an economic report. . . ." Markle Pet. App. A-38; *see id.* A-6 – A-7 (explaining that its review under the APA asks whether the designation was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

Furthermore, the Fifth Circuit's decision is consistent with the only other circuit court that has confronted the issue. *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 990 (9th Cir. 2015). In *Bear Valley Mut. Water Co.*, the Ninth Circuit explained that the ESA "cannot be read to say that the FWS is ever obligated to exclude habitat that it has found to be essential. Such a decision is always discretionary and the statute 'provides absolutely no standards that constrain the Service's discretion' not to exclude. . . ." *Id.*[4]

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[4] Every district court to consider the question has also reached the same conclusion. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude [an area] from designation, which is committed to the agency's discretion."); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 28-29 (D.D.C. 2010) (while acknowledging the "strong presumption that agency action is reviewable," finding that "[t]he plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat"); *Home Builders Ass'n v. U.S. Fish & Wildlife Serv.*, No. S-05-0629 WBS-GGH, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) (concluding that the ESA "provides a standard by which to measure an agency's choice to exclude an area based on economic or other considerations," but provides "no substantive standards by which to review the FWS's decisions not to

Given the consistency of the only two appellate decisions to have addressed the issue, this case presents no conflict for this Court to resolve and no reason for this Court to grant the petitions.

III. The Court of Appeals' Conclusion that the Designation of Critical Habitat is Constitutional is Correct and Consistent with All Other Appellate Decisions

Petitioners argue that the designation of Unit 1 violates the Commerce Clause and the Tenth Amendment, but their baseless arguments provide no reason for the Court to grant certiorari. Some of Petitioners' arguments were never raised prior to their Petitions, and this Court should decline to consider them. Regardless, Petitioners' arguments go against all prior appellate jurisprudence and lack sufficient support to merit review in the face of the judicial consensus rejecting them.

Every circuit court to consider the issue has upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See* Markle Pet. App. A-44 – A-45; *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1008 (10th Cir. 2017) (holding that the Commerce Clause authorizes FWS to prohibit "take" of the Utah prairie dog, a purely

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exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion"), *modified on other grounds*, 2007 WL 201248 (E.D. Cal. Jan. 24, 2007).

intrastate species, on nonfederal land), *petition for reh'g en banc denied*, No. 14-4151 (10th Cir. Aug. 8, 2017), *petition for cert. filed*, No. 17-465 (Sept. 26, 2017); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1174-77 (9th Cir. 2011) (upholding regulation of take of purely intrastate, noncommercial delta smelt as essential part of ESA's comprehensive regulatory scheme), *cert. denied sub nom., Orchards v. Salazar*, 565 U.S. 1009 (2011); *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1271-74 (11th Cir. 2007) (upholding regulation of purely intrastate, noncommercial Alabama sturgeon as essential part of ESA's comprehensive regulatory scheme), *cert. denied*, 552 U.S. 1097 (2008); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006) (upholding the ESA as a Constitutional exercise of Congressional authority under the Commerce Clause); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 638-41 (5th Cir. 2003) (upholding regulation of take of a purely intrastate cave species as essential to ESA's comprehensive regulatory scheme), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (upholding the regulation of take of a purely intrastate toad and finding that "invalidating this application of the ESA would call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans") (quotation marks and citation omitted), *cert. denied*, 540 U.S. 1218 (2004); *Gibbs v. Babbitt*, 214 F.3d 483, 492-98 (4th Cir. 2000) (holding that take of purely intrastate red wolves is economic activity that substantially affects interstate commerce, and that regulation

of that take is an essential part of ESA's comprehensive regulatory scheme), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049-57 (D.C. Cir. 1997) (stating that regulation of take of a purely intrastate fly species substantially affects interstate commerce by preventing loss of biodiversity and regulating interstate commercial development), *cert. denied*, 524 U.S. 937 (1998).

In keeping with every other appellate court to consider the issue, the court of appeals upheld the constitutionality of the critical habitat designation under the aggregation principle, which provides that intrastate activity can be regulated if it is an essential part of a larger regulation of economic activity with a substantial effect on interstate commerce. Markle Pet. App. A-42; *see United States v. Lopez*, 514 U.S. 549, 558-59 (1995).[5] Rejecting the Petitioners' narrow framing of the issue as to whether *the designation of Unit 1* as critical habitat had a substantial effect on interstate commerce, the court of appeals found that the designation of critical habitat *in general* was a valid exercise

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[5] The fact that only federal action triggers the ESA's consultation requirement differentiates the ESA from the Gun-Free School Zones Act of 1990, at issue in *Lopez*, in which there was "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Lopez*, 514 U.S. at 561. Petitioners' constitutional objections to the designation of Unit 1 are undermined by the fact that any federal action on Unit 1 triggering Section 7 consultation would have to rest on its own independent Commerce Clause basis.

of Commerce Clause authority because it was an essential part of an economic regulatory scheme with a substantial effect on interstate commerce. Markle Pet. App. A-39 – A-47, n.23. That such an economic regulatory scheme "ensnares some purely intrastate activity is of no moment." *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

The court of appeals found that the ESA is an economic regulatory scheme that is designed to preserve imperiled species and their habitats, specifically noting that "habitat protection and management – which often intersect with commercial development – underscore the economic nature of the ESA and its critical-habitat provision." Markle Pet. App. A-43. The court of appeals then found the designation of critical habitat essential to that scheme because of the clear link between species survival and preservation of the habitat on which those species depend. *Id.* at A-45. Given that courts are not free to "excise individual components of [a] larger scheme," *Raich*, 545 U.S. at 22, the court of appeals ruled that "[a]llowing a particular habitat – one that the Service has already found to be essential for the conservation of the species – to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat." Markle Pet. App. A-45 – A-46. Therefore, the court of appeals found the designation of Unit 1 constitutional, noting that Petitioners conceded that the critical habitat provision of the ESA is a lawful exercise of Commerce Clause authority. *Id.* at A-47.

Petitioners do not take issue with the substance of the court of appeals' commerce clause analysis. Instead, Petitioners grasp at straws without any supporting ESA case, and rely on a Clean Water Act case to argue that designation of Unit 1 "creates a line-drawing problem that implicates the outer boundaries of constitutional power." Markle Pet. 36-37 (citing *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (hereinafter *SWANCC*)); *see* Weyerhaeuser Pet. 22 (similar). But *SWANCC* has no relevance here, as it decided the extent of the Clean Water Act's definition of "navigable waters" on statutory – not constitutional – grounds. *SWANCC*, 531 U.S. at 171-72; *see also Rancho Viejo*, 323 F.3d at 1071 (noting that the Supreme Court "expressly declined" to reach the question of whether the designation of certain wetlands were within the U.S. Army Corps of Engineer's constitutional authority).

Additionally, Congress did not clearly indicate it meant the Clean Water Act to "invoke[] the outer limits of Congress' power," *SWANCC*, 531 U.S. at 172, while conversely, it is "abundantly clear" that Congress designed the ESA "to halt and reverse the trend toward species extinction, *whatever the cost*." *Tenn. Valley Auth.*, 437 U.S. at 184 (emphasis added). Therefore, the ESA reflects Congress' intent to invoke the full extent of its authority to protect imperiled species. *Tenn. Valley Auth.*, 437 U.S. at 184.

Moreover, the effect on interstate commerce is much stronger here than in other cases for which this Court has declined certiorari, such as *GDF Realty*, in

which the Fifth Circuit found a substantial aggregate effect from subterranean invertebrate cave species found only in Texas. 326 F.3d at 638-41. Unlike the cave species at issue in *GDF Realty*, the gopher frog attracts people to travel across state lines to view it in the wild and in a zoo in New Orleans.[6] 326 F.3d at 638 ("[T]here is no historic trade in the Cave Species, nor do tourists come to Texas to view them."). In addition, the gopher frog is not purely intrastate. It was historically found across three states, and FWS designated critical habitat in two states. 77 Fed. Reg. at 35,124, 35,134.

Petitioners also argue that the designation of unoccupied critical habitat on private land somehow runs afoul of the Tenth Amendment. But this argument does not warrant review either. First, Petitioners never raised it below. The complaints lack any Tenth Amendment claims; neither the district court nor the court of appeals considered Tenth Amendment arguments, and the Tenth Amendment was never the basis for any opinion issued in this case, dissenting or otherwise. In keeping with its well-established tradition, this Court should decline to hear issues not brought to the lower courts. *See Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

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[6] *See* ROA.14-31008.2554 at ¶¶ 7-8 (Greenwald Decl.) (travelling from Oregon to view wild gopher frogs in Mississippi); ROA.14-31008.2559-60 at ¶¶ 7-9 (Demoss Roberts Decl.) (travelling from Louisiana to view wild gopher frogs in Mississippi and viewing captive gopher frogs at the Audubon Zoo in New Orleans).

Regardless, Petitioners cite no authority to support their new argument. Rather, Petitioners cite *SWANCC* for the proposition that the designation of unoccupied habitat encroaches "upon a traditional state power." 531 U.S. at 173; Markle Pet. 39, Weyerhaeuser Pet. 22. But *SWANCC* is irrelevant, as it never addressed the Tenth Amendment.

The Tenth Amendment only gives States "powers not delegated to the United States by the Constitution." U.S. CONST. amend. X. And "[i]t is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." *Raich*, 545 U.S. at 29 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)); *see also, e.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 338-39 (1979) (finding that a state's control over wildlife within its borders must yield to the federal commerce power). Indeed, "[t]he Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981) (citations omitted).

Therefore, because the Commerce Clause allows FWS to designate critical habitat, it is immaterial if the agency's designation might somehow encroach upon a traditional state power.

IV. FWS Found the Gopher Frog Critical Habitat Designation Would Have Several Benefits, and Petitioners' and Amici's Claims Regarding the Costs are Exaggerated

Petitioners and Amici offer policy arguments to claim that FWS's statutory requirement to designate critical habitat is overly burdensome and does not reflect a valid balancing of costs and benefits. *See, e.g.*, Weyerhaeuser Pet. 28-29; Br. of Coal. for a Sustainable Delta, *et al.* 5-8. Those arguments are properly directed to Congress rather than this Court and do not provide a basis for review of the court of appeals' decision. *See* Markle Pet. App. B-42.

Petitioners and Amici also argue that it was inappropriate for FWS to designate Unit 1 in particular because the designation has "no benefits" for the frog but would enact substantial costs on Petitioners and Amici. *See, e.g.*, Weyerhaeuser Pet. 26-27; Markle Pet. 22-23. In so arguing, Petitioners and Amici simply ignore explicit statements in the final rule and the Economic Analysis regarding the benefits of the designation and make claims regarding the economic impact of the designation that have no basis in reality.

FWS articulated in the final rule numerous benefits to gopher frog conservation from designation of Unit 1. For example, FWS explained that "[m]aintaining the five ponds within this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for

the species' eventual recovery." 77 Fed. Reg. at 35,135. In other words, Unit 1 helps ensure against extinction by providing another area within the species' historical habitat where the frogs could live if the area in Mississippi becomes uninhabitable due to disease, drought, natural disaster, or other threats.

The Economic Analysis also articulated numerous economic benefits of the critical habitat designation, including increased property values for nearby landowners and aesthetic benefits. *See* Economic Analysis 5-2. The Economic Analysis further identified ecosystem services provided by the preservation of Unit 1, including promoting high water quality and providing habitat for other rare species. *Id.*; *see also* 77 Fed. Reg. at 35,141.

Petitioners' and Amici's contentions about the economic and societal impact of the designation are similarly disingenuous. They try to create the impression that the gopher frog critical habitat designation will foreclose any economically valuable use of Unit 1 altogether. *See, e.g.*, Br. of St. Tammany Parish 1. This suggestion is incorrect.

The designation means only that the *federal* government must ensure that actions it funds, carries out, or permits that affect gopher frog critical habitat will not destroy or adversely modify that habitat, which federal agencies will do through Section 7 consultation with FWS. 16 U.S.C. § 1536(a)(2). Yet consultation almost never stops projects. *See* Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions about a*

Controversial Provision of the U.S. Endangered Species Act, 112 PNAS 15844 (2015), http://www.pnas.org/content/112/52/15844. Rather, consultation may conclude informally when the federal agency taking the action determines the action is not likely to adversely affect critical habitat and FWS concurs in writing. 50 C.F.R. § 402.13. Or, if adverse impacts to critical habitat might occur, formal consultation is initiated, which culminates in a biological opinion in which FWS determines whether the federal action is likely to result in adverse modification to critical habitat. 50 C.F.R. § 402.14. If consultation results in an adverse modification determination, FWS develops measures that can be incorporated into the project to mitigate its impacts on the affected habitat and allow the project to go forward. 16 U.S.C. § 1536(b)(3)(A). In this way, the consultation process can steer development away from the most sensitive areas and help ensure any remaining significant impacts are properly mitigated.

Here, FWS determined that designation of Unit 1 could potentially result in loss of development ranging from $0 to $33.9 million over 20 years. 77 Fed. Reg. at 35,140-41. This potential loss depends on a number of contingencies, including whether development projects are proposed, whether any federal agency approval may be required for those projects, and possible limits FWS might impose after any consultation that accompanies federal action. *Id.*

Importantly, Petitioners mischaracterize the record when they complain of a loss of $34 million. *See, e.g.*, Markle Pet. 32; Weyerhaeuser Pet. 4. They fail to

acknowledge that the designation could have *no* economic impact at all if the land continues to be used for timber production (because no federal nexus would trigger the consultation requirement), or if other forms of development do not require federal permission because they do not result in dredging or filling of federal jurisdictional waters. 77 Fed. Reg. at 35,123. Their claims of other costs, including to the national economy, are even more unsubstantiated. Weyerhaeuser Pet. 4. Both the district court and the court of appeals upheld the Service's economic impact analysis. Markle Pet. App. A-38 – A-39; B-38 – B-42.

In short, Petitioners' and Amici's fears that the designation would prohibit all economic uses of Unit 1 are overblown and provide no reason for the Court to hear this case.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

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No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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FWS contends that courts should defer to its supposedly factbound determination that an unoccupied critical habitat designation is "essential to the conservation of the species." But as Judge Jones and five other judges pointed out in dissent from denial of rehearing en banc, "[e]ach issue" in this case turns "on statutory construction, not on deference to administrative discretion or scientific factfinding." Pet. App. 126a. Under the plain language of Section 1533(a)(3)(A)(i), FWS lacks the authority to designate as "critical habitat" land that is not "habitat of such species." And private land that FWS concedes is not inhabited by the endangered species and that the species *cannot* inhabit because it contains only one of the features essential to the species' survival is not "habitat" by any plausible interpretation of the term. No issues of deference or factfinding are involved; the plain meaning of the phrase "any habitat of such species" contradicts FWS's claim that it can designate uninhabitable non-habitat as unoccupied critical habitat.

Absent this Court's intervention the Service's vast expansion of its power through this misreading of the statute will impose massive costs on landowners. It also will subvert the land-use authority of States and their subdivisions, as demonstrated by amicus briefs in support of certiorari filed by 18 States and by local governments—including the Louisiana Parish whose development plans have been thwarted by the designation here. Thirteen amicus briefs from a wide variety of business and governmental interests attest to the great importance of the questions presented.

Respondents refute none of our arguments showing that this Court's review is warranted.

I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions, In Conflict With The Ninth Circuit.

1. Respondents cannot defend the Fifth Circuit's holding that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. The ESA plainly does impose a habitability requirement by restricting FWS's designation power to "habitat of [listed] species which is * * * critical habitat." 16 U.S.C. § 1533-(a)(3)(A)(i); see Pet. 15-17. CBD ignores this statutory text, and the Service (at 21) buries it deep in its argument, flouting the cardinal principle that "[s]tatutory interpretation, as [this Court] always say[s], begins with the text." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016).

FWS then gives away the case by admitting (at 22) that "'habitat' and 'critical habitat'" are "distinct concepts." It follows that designated areas must be "habitat" because the ESA requires the presence of *both* "habitat" *and* "critical habitat" in designated areas.

FWS argues (at 22) that an area can be "'habitat'" without being "currently inhabit[ed]." But the plain meaning of "habitat" requires that the area allow the species to "'naturally liv[e] and gro[w].'" Pet. 16 (quoting WEBSTER'S THIRD). Habitat need not be currently inhabited; but *uninhabitable* land is not "habitat."

The Service claims that we "rely" on its "observation" that "Unit 1 does not currently contain [a]ll three of the primary constituent elements (PCEs) of frog habitat"—a requirement that FWS says (at 22) comes from the statutory definition of "occupied critical habitat." Our argument is more straightforward: It is undisputed that the frog's survival depends on "fire-

maintained, open-canopied" forests that Unit 1 lacks. 77 Fed. Reg. 35129. If the frogs were moved there, they would die. No reasonable interpretation of "habitat" includes such land.

FWS asserts (at 23) that it "never concluded that Unit 1 is not 'habitat' or is 'uninhabitable.'" But it indisputably did so. FWS concluded that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat" and that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." 77 Fed. Reg. 35129, 35135. The Fifth Circuit observed that FWS "found that" Unit 1 is "currently uninhabitable." Pet. App. 24a. The dissents agreed that "Unit 1 is uninhabitable." Pet. App. 128a (Jones, J.); see Pet. App. 48a (Owen, J.). The "factual record" contradicts FWS's newly invented claim. U.S. Br. 22.[1]

2. FWS's contention (at 21-22) that we did not preserve our habitability argument is "easily disposed of." Pet. App. 139a (Jones, J.). "[T]he landowners' argument that the ESA requires a species' critical habitat to be habitable" is "well documented." *Ibid.*

The panel expressly considered and rejected our "argu[ment]" that FWS's designation "'exceeded its statutory authority'" "because Unit 1 is not currently habitable," holding that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 21a, 23a. Indeed, CBD concedes (at 10) that the panel decided "Petitioners' argument that unoccupied critical habitat must be 'currently habitable.'" The dissents

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[1] CBD's argument (at 12) that Unit 1 qualifies as "former or historical 'habitat'" violates the plain language of the ESA, which requires that designated areas be "habitat," not *former* habitat. See Pet. 20.

refuted that holding head-on. Pet. App. 65a (Owen, J.) (criticizing the majority for "re-writ[ing]" the ESA by permitting FWS "to designate an area as 'critical habitat'" "even though the area is uninhabitable"); Pet. App. 131a-142a (Jones, J.) ("the ESA contains a clear habitability requirement").

Thus, our "preservation of the habitability issue is anything but inadequate." Pet. App. 139a (Jones, J.). And the fact that the issue "was addressed by the court below" in any event preserves it for review. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The issue is case-dispositive and properly presented.

3. Alternatively, respondents also fail to justify the designation under the statutory requirement that unoccupied critical habitat must be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). They call such designations "factbound" and "within the bounds of *Chevron*." U.S. Br. 16-18; see CBD Br. 12. But *Chevron* "does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan* v. *EPA*, 135 S. Ct. 2699, 2708 (2015).

Respondents' reading clashes with the statutory definition of "occupied" "critical habitat," which requires "those physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). "[A]reas" that lack "those * * * features" that are "essential to the conservation of the species" cannot possibly be "essential for the conservation of the species." *Id.* § 1532(5)(A). Respondents' contrary interpretation is absurd, for it would make it *easier* to designate areas as critical habitat if the species *does not* and *cannot* live there. "[T]he test for unoccupied critical habitat is designed to be *more* stringent than

the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

No reasonable interpretation of the phrase "essential for the conservation of the species" includes Unit 1, which "plays no part in the conservation" of the frog and "will not support" the frog in the future. Pet. App. 48a (Owen, J.). To sidestep this commonsense conclusion, FWS misrepresents (at 20) that it is merely "likely" that Unit 1 will "require modifications to the surrounding uplands" to support the frog. But, as FWS admits (at 6), it found that "three" features are "needed" for the frog to survive and that only "one" of those features exists on Unit 1. 77 Fed. Reg. 35131.

FWS's further claim (at 20) that we do "not disput[e]" that it is "readily feasible" to convert Unit 1 into habitat is astonishing. Unit 1 *cannot* serve as frog habitat *unless* petitioners:

- chop down their "closed-canopy" "loblolly" trees and plant "open-canopied" "longleaf" pines;
- burn Unit 1 with "frequent fires" to "support a diverse ground cover of herbaceous plants" despite "acknowledge[d]" "landowner concern" and "negative impacts" of such fires;
- terminate "on-going timber management of the site, which precludes burning or planting longleaf pine trees";
- allow "60 percent" or "100 percent" of Unit 1 to be "managed" as "refuge for the frog," at a cost of "$20.4 million" or "$33.9 million" in "lost development value"; *and*
- agree "voluntar[ily]" to "frog translocations."

77 Fed. Reg. 35123-24, 35126, 35129, 35141. "[T]here is no evidence" that these "substantial alterations" "will,

or are likely to, occur," confirming that Unit 1 is "not 'essential' for conservation." Pet. App. 48a (Owen, J.).

4. Other ESA provisions, which respondents ignore, confirm that the Fifth Circuit misinterpreted the ESA's critical habitat provisions. Pet. 18-20. Respondents are silent too on the legislative history documented in the petition (at 21). Our un-rebutted arguments based on statutory structure and context leave no doubt that the designation is unlawful.

5. FWS acknowledges (at 31 n.10), but never responds to, our argument (at 21-23) that the ESA must be read narrowly to avoid significant constitutional doubts that the designation raises under the Commerce Clause and Tenth Amendment. It also is conspicuously mute about the federalism concerns discussed in the petition and reinforced by amicus briefs of 18 States, St. Tammany Parish, San Juan County, Utah, and the San Luis and Delta-Mendota Water Authority, among others.

The Service (at 32) thinks it enough to avoid Commerce Clause concerns that the panel concluded that "'the ESA is an economic regulatory scheme' and that 'designating critical habitat is an essential part'" of that scheme. But the Government said the same of the individual mandate. See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 548-549. FWS argues (at 32) that "there is no circuit split" while ignoring considerable dissent. See *Rancho Viejo, LLC* v. *Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J.); *id.* at 1158 (Sentelle, J.); *GDF Realty Investments, Ltd.* v. *Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J.); *Gibbs* v. *Babbitt*, 214 F.3d 483, 486 (4th Cir. 2000) (Luttig, J.). And it claims (at 33) that this case is a "poor vehicle" to consider our Commerce Clause argument because a designation is "not the direct regulation of petitioners' conduct." But,

as FWS and the panel noted, the designation "'immediately'" reduced Unit 1's value. Pet. App. 13a. The time to question the constitutionality of a designation is when, as here, FWS issues a "Final Rule" (77 Fed. Reg. 35118) designating the land.[2]

Because the designation tests the boundaries of federal powers under the Commerce Clause and Tenth Amendment, the constitutional avoidance canon requires a narrow reading of the ESA. Pet. 21-23. The Fifth Circuit should have "read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation." *SWANCC*, 531 U.S. at 174.[3]

5. The panel's ruling "conflict[s] with *all* relevant precedent." Pet. App. 149a (Jones, J.). FWS concedes (at 27) that the Ninth Circuit has twice held that the ESA imposes a "more onerous" and "more demanding standard" for the designation of unoccupied critical habitat than for occupied critical habitat. FWS's suggestion (at 26) that the Fifth Circuit "nowhere stated that it was 'impos[ing] a *lower* standard on the designation of unoccupied critical habitat'" is nonsense. The Fifth Circuit held that "*unoccupied* land" need not

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[2] Contrary to CBD's suggestion (at 27), FWS identified no interstate commerce in the frog. Nor does CBD claim that anyone travels to Unit 1 to view the frog, which would be trespass on private land where the frog does not live and cannot survive.

[3] CBD (at 26) tries to distinguish *SWANCC* as a "Clean Water Act" case decided on "statutory" grounds. As in *SWANCC*, our argument is statutory, and the avoidance canon applies because FWS's interpretation raises significant constitutional concerns and is not compelled by "unmistakably clear" "language of the statute." *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002). CBD's inability (at 26) to cite *statutory* language proves that the ESA does not overcome the canon's clear statement rule.

be "habitab[le]" but "*occupied* land" must be habitable. Pet. App. 23a. That is a *lower* standard that conflicts with Ninth Circuit precedent. Pet. 24-25.

II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

1. The Service does not deny that designations impose significant costs on private landowners with no quantifiable benefits to listed species. See Pet. 26-30.[4] Nor does it acknowledge *any* of the 13 amicus briefs in support of the petition that lay bare the extraordinary, nationwide importance of this case.

2. Respondents identify no limiting principle to the Fifth Circuit's ruling. FWS denies (at 20) that the Fifth Circuit held that FWS may designate an area if it contains just "one of the 'physical or biological features' essential to the conservation of the species." But "that is precisely the import of its holding." Pet. App. 68a-69a (Owen, J.). The Fifth Circuit held that, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the [frog's] conservation." Pet. App. 30a-31a n.20. That holding allows FWS to designate any uninhabitable land as critical habitat by identifying one "essential" "featur[e]," such as "trees with potential nesting platforms," "upland areas," and "natural light regime[s]"—"features" that FWS "routinely lists" in its designations. Pet. App. 155a-156a (Jones, J.).

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[4] Contrary to CBD's assertion (at 30), the Economic Analysis only pointed to speculative "potential benefits" from designation, all of which "derive[d]" from "the avoidance of development in Unit 1." Final Econ. Analysis at 5-2, ¶ 112. And in its Final Rule, FWS decided that all benefits were "best expressed" in unquantifiable "biological terms." 77 Fed. Reg. 35127.

And FWS piles on limits to challenging a designation based on a single habitat feature. FWS claims (at 21) a "scientific consensus" regarding the "rarity" of the ponds. And it says landowners challenging designations must overcome "particular deference" to such "scientific determination[s]," which are subject to a "narrow" standard of review. U.S. Br. 17. CBD even claims (at 12) that this "highly fact-specific inquiry" is "not appropriate for review by this Court." Thus a designation of non-habitat, based on the presence of just one of multiple features that an endangered species must have to survive, becomes effectively unchallengeable. Landowners have no judicial recourse under these "toothless" standards, making FWS's designation power "virtually limitless." Pet. App. 142a, 155a (Jones, J.).

3. FWS promulgated a new regulation that mirrors the standards it used to designate Weyerhaueser's land and relies on the decision in this case to justify the rule. Pet. 30-31. Respondents suggest (U.S. Br. 19 n.6; CBD Br. 17) that pending challenges to this regulation reduce the importance of certiorari. But as FWS explains (at 18 n.6), those challenges "have repeatedly been stayed," at least through February 2018, and FWS has not answered the complaints or moved to dismiss. FWS's speculation about a potential settlement of the rule challenge should be given no credence at all when in this case it has vigorously maintained its view that it can designate uninhabitable non-habitat based on the presence of a single habitat feature, and when the rule challenge has been stayed until after this petition is ruled on by this Court. Notably, the same States that have challenged the new rule have filed an amicus brief in support of review here. Br. Amicus Curiae of Alabama and 17 Additional States, at 1.

As FWS admits (at 19 n.6), the rule challenges "do not affect" the "designation of critical habitat for the dusky gopher frog." Nor do they reduce the compelling need for review in this case. FWS's designation violated the *statute*, which no regulation can cure. The Court should grant certiorari to resolve this important statutory issue now, in this concrete, particularized context. Reversal here also would effectively decide the rule challenges. Pet. 30-31.

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

The Service hardly defends the panel's ruling that FWS decisions *not* to "exclude any area from critical habitat" are judicially unreviewable. 16 U.S.C. § 1533(b)(2). FWS maintains (at 28) that "the statute affords 'no meaningful standard against which to judge the agency's exercise of discretion,'" but that is plainly wrong. The statute provides that areas may be excluded if "the benefits of such exclusion outweigh the benefits of [designation]." 16 U.S.C. § 1533(b)(2). The ESA thus requires agency cost-benefit analysis, which courts routinely review for abuse of discretion under the APA. See Pet. 32-33. Indeed, CBD admits (at 19) that courts may review this analysis when FWS "deci[des] to exclude an area from a designation." The same review of the same analysis should occur when FWS decides not to exclude the area. FWS also argues (at 29) that the ESA does "not impose any 'standards for when areas *must* be excluded from designation,'" but that simply shows that FWS's decision is discretionary. Review for abuse of *discretion* answers FWS's objection.

Not only do respondents' arguments fail under the "'strong presumption' favoring judicial review of administrative action" (*Mach Mining*, 135 S. Ct. at 1651), but they lead to absurd results. Under their reasoning, it is insignificant that FWS found up to $34 million in landowner costs and only unquantifiable "biological" benefits from designating uninhabitable land. Nor would it matter if FWS found $1 trillion in costs or declined to exclude the island of Manhattan from unoccupied critical habitat. Courts would be forced to accept that FWS appropriately weighed costs and benefits, a result that is "insupportable and an abdication of [courts'] responsibility to oversee, according to the APA, agency action." Pet. App. 162a (Jones, J.).

Respondents fail to explain away the conflict with *Bennett* v. *Spear*. There, this Court stated that FWS's "ultimate decision" under Section 1533(b)(2) "is reviewable" for "abuse of discretion" and explained that an "objective" of the ESA "is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 172-173, 176-177. FWS (at 30) calls this unanimous Court's "reasoning" a "passing *dictum*." But it was "holding." Pet. App. 161a (Jones, J.). Moreover, *Bennett* provides this Court's *only* statement on reviewability under Section 1533(b)(2), which the panel "never confront[ed], much less distinguish[ed]." *Ibid.* Because the panel "decided an important federal question in a way that conflicts with relevant decisions of this Court" (Sup. Ct. R. 10(c)), review of the second question presented by the petition is warranted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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Nos. 17-71 and 17-74

In the
Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,
v.
UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,
Respondents.
MARKLE INTERESTS, LLC, ET AL.,
Petitioners,
v.
UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,
Respondents.

On Petitions for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF ALABAMA AND 17 ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This amicus brief addresses the following two questions presented:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

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INTEREST OF *AMICI CURIAE*[1]

The *amici* States are deeply concerned that the Fifth Circuit's expansive reading of the Endangered Species Act strips the statute of the express limitations that Congress imposed on the United States Fish and Wildlife Service with regard to the designation of "critical habitat." Last year, eighteen States, including these *amici*, challenged two new rules that expressly authorized the unlawful method of critical-habitat designation the Service followed in this case. *See Alabama ex rel. Strange v. Nat'l Marine Fisheries Serv.*, No. 16-cv-593 (S.D. Ala.).

Even if those new rules are repealed, the Fifth Circuit's expansive reading of the existing rules and statute will impose significant costs on the States. Critical habitat determinations have serious consequences for the economic and ecological interests of the States. Designations of critical habitat that go beyond what the statute allows cost jobs and tax revenue, while the States' efforts to comply with these designations often require the expenditure of taxpayer funds.

The States have a profound interest in maintaining the delicate balance Congress struck in the ESA between ensuring the recovery of listed species and protecting the private property rights of citizens and the sovereign interests of the States. The opinion of the Fifth Circuit upsets that balance, and this Court should grant the petition as a result.

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[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision on review in cases No. 17-71 and No. 17-74 raises questions of exceptional importance and is inconsistent with both the statutory text and the Court's precedent. Over a strong dissent by Judge Owen, the Fifth Circuit upheld a designation of land that was unoccupied and uninhabitable by the dusky gopher frog as a "critical habitat" for that frog. That circuit denied rehearing en banc over a dissent by six judges who contended that the panel's decision violated the statute and that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." Weyerhaeuser Pet. App. 126a. The Court should grant the petition and reverse this expansive and costly decision.

The Court should grant the petitions in these two cases for three reasons. First, contrary to the plain language of the Endangered Species Act, the Fifth Circuit's "unprecedented and sweeping" decision would allow the Government to declare land "essential" to the conservation of a species even if that land is not and may never be habitable by that species. Weyerhaeuser Pet. App. 50a. Second, contrary to the Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997), the Fifth Circuit declared certain critical habitat findings immune from judicial review. Third, the Service's designation could impose up to $34 million costs on landowners while providing only speculative conservation benefits. Weyerhaeuser Pet. App. 129a (citing 77 Fed. Reg. at 35,140).

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's expansive definition of the word "essential" ignores the plain text of the Endangered Species Act.

The Fifth Circuit's decision gives the United States Fish and Wildlife Service unfettered reign to declare areas that are unsuitable for endangered species nevertheless "essential" to their conservation.

The plain text of the Endangered Species Act imposes more stringent requirements on the designation of unoccupied land as critical habitat than on the designation of occupied land. That act defines critical habitat as areas occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532 (5)(A)(i). Unoccupied areas trigger an additional requirement—the Secretary must determine that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). As other courts have noted, the statute imposes "a more onerous procedure on the designation of unoccupied areas." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

The Fifth Circuit's decision flips this reasoning on its head. Rather than reading "essential for the conservation of the species" as an additional

requirement, the Fifth Circuit lowered the bar for designating unoccupied habitat. If the Secretary finds occupied areas are insufficient for conservation, he may designate any unoccupied area as critical habitat, regardless of whether the area is or ever will be habitable by the species. Under the Fifth Circuit's reasoning, although the Secretary must show that areas *where the species is present* have all physical and biological features essential to conservation, no such showing is required for unoccupied lands. *See* Weyerhaeuser Pet. App. 23a.

Thus, the panel's decision strips the word "essential" of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator. As Judge Owen noted in her dissent from the panel's decision, this "interpretation of 'essential' means that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Weyerhaeuser Pet. App. 54a.

II. The Fifth Circuit's holding that habitat exclusion decisions are nonreviewable contradicts *Bennett v. Spear*.

The Fifth Circuit also erred in declaring certain critical habitat decisions immune from judicial challenge. Congress, recognizing the significant economic and environmental impacts critical habitat designations entail, amended the Endangered Species

Act to include a mandatory cost-benefit analysis of critical habitat decisions:

> The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

The panel found these decisions nonreviewable because the Administrative Procedure Act forbids judicial review of choices "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The panel explained, "[Section 1533(b)(2)] establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation."

Weyerhaeuser Pet. App. 35a (citing *Bear Valley Mut. Water Co.*, 790 F.3d at 989).

But the Court has rejected that argument. In *Bennett v. Spear*. 520 U.S. 154 (1997), the Court held that § 1533(b)(2) decisions are not immune from judicial review. *Bennett* involved the Endangered Species Act's citizen-suit provision. Like the Administrative Procedure Act, it precludes challenges to decisions that are "discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C). In *Bennett*, the Government sought to dismiss the underlying action on the basis that the duties of § 1533(b)(2) are discretionary and thus nonreviewable. 520 U.S. at 172. The Court rejected that argument: "[T]he terms of § 1533(b)(2) are plainly those of obligation rather than discretion . . . ." *Id.*

The Court found Section 1533(b)(2) decisions reviewable, notwithstanding the discretion granted by the "may" clause. The Court explained, "[T]he fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533 (b)(2)). On this point the Court was emphatic: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Id.* (citing *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943)); *see also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (explaining that the use of "a permissive term such as 'may' rather than a mandatory term such as

'shall,' . . . suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show *deference* to the agency's determination" but that "such language does not mean the matter is *committed* exclusively to agency discretion."). Thus, the Court concluded that a "§ 1533 claim is reviewable." *Bennett*, 520 U.S. at 172.

The lower court did not examine the reviewability question in light of *Bennett*, mentioning the case only once in passing. The Fifth Circuit's failure to conduct any kind of searching inquiry into the application of *Bennett* to this case underscores the need for the Court's review. The decision to designate critical habitat and the decision to exclude certain areas from that designation have far-reaching implications. In both instances, the Secretary is exercising the coercive power of the government over private property. When the Secretary abuses her discretion, the courts must have the power to correct that overreach.

In refusing even to consider whether the Secretary overreached, the panel relied on the Court's decision in *Heckler v. Chaney*, the leading case on nonreviewability. 470 U.S. 821 (1985). In finding nonreviewable an agency's decision not to employ its prosecutorial powers, the *Heckler* Court noted that an agency "generally does not exercise its coercive power . . . and thus does not infringe upon areas that courts often are called upon to protect" when it refuses to act. *Id.* at 832. But when the Secretary refuses to exclude areas from a critical habitat designation, she is not refusing to act in the sense used by the *Heckler* Court. Rather, she is exercising her coercive power to the fullest. When she does so, her action touches upon the most basic property rights of those within the

critical habitat designation. Although the Endangered Species Act is "a noble effort," it is one that has "the ability to ruin individuals' lives . . . [M]ost Americans do not realize that hundreds of thousands of rural citizens face the potential loss of their livelihoods stemming from FWS designations of [critical habitat] under the ESA." Matthew Groban, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give A Hoot About the Public Interest It "Claims" to Protect?*, 22 VILL. ENVTL. L.J. 259, 279 (2011). It also has costs for the States, both in reduced tax revenue and jobs lost. *See* Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST (May 11, 2014).[2]

The Secretary cannot ignore these costs or impose them without a commensurate benefit. As the Court has found, it is inherently irrational "to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2701 (2015). The decision of the Fifth Circuit allows the Secretary to do just that, with no recourse to the courts.

III. Critical-habitat designations have significant financial effects on States and private parties.

Even when critical-habitat designations benefit a species, they also come with a cost. "Consideration of cost reflects the understanding that reasonable

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[2] https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/.

regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan*, 135 S. Ct. at 2707. In the context of the Endangered Species Act, it is beyond dispute that "[c]onsiderable regulatory burdens and corresponding economic costs are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation." Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation A Comment on Critical Habitat and the Challenge of Regulating Small Harms*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10678, 10680 (2013). For example, the Court's first major decision examining that act, *Tennessee Valley Authority v. Hill*, resulted in the suspension of a dam-building project that was 80 percent complete and for which Congress had spent more than $100 million of taxpayer money. 437 U.S. 153, 172 (1978).

It was a harbinger of things to come. Critical habitat designations, by their very nature, limit human activity. That limitation almost always results in a lost economic opportunity. The impact ripples through the economy; in an average industry, every billion dollars in regulatory costs results in a loss of over 8,000 jobs. Sam Batkins & Ben Gitis, *The Cumulative Impact of Regulatory Cost Burdens on Employment*, AM. ACTION FORUM (May 8, 2014).[3] As a consequence, States also suffer a subsequent loss of tax revenue, both as a result of reduced employment as well as foreclosed industrial and recreational use of areas designated critical habitat. For instance,

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[3] http://www.americanactionforum.org/research/the-cumulative-impact-of-regulatory-cost-burdens-on-employment/.

proposals to conserve the sage grouse "could cost up to 31,000 jobs, up to $5.6 billion in annual economic activity and more than $262 million in lost state and local revenue every year . . . ." Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST (May 11, 2014).[4] And, in the case below, as Judge Jones observed in her dissent from denial of rehearing en banc, "One shocking fact is that the landowners could suffer up to $34 million in economic impact. Another shocking fact is that there is virtually noting on the other side of the economic ledger." Weyerhaeuser Pet. App. 158a (citation omitted). Not to mention, it is uncontested that the dusky gopher frog could not survive in Unit 1—its "critical habitat." *See* Weyerhaeuser Pet. App. 23a. Thus, there are only—at most—speculative conservation benefits to this designation.

While the ESA may certainly require sacrifices in order to preserve endangered species, the decision to impose those costs on States and the public must conform with the requirements of the statute. That did not happen here.

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[4]https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

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RECORD AND BRIEFS

AUG 14 2017

No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION, THE NATIONAL ALLIANCE OF FOREST OWNERS, AND THE NATIONAL MINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*

The American Farm Bureau Federation (Farm Bureau), the National Alliance of Forest Owners (NAFO), and the National Mining Association (NMA) respectfully submit this brief as *amici curiae* in support of the Petitioner.[1]

The *amici curiae* have a substantial interest in this case because the designation of private property as critical habitat under the Endangered Species Act (ESA) is a remarkably intrusive action that imposes significant burdens on landowners and restricts their ability to fully utilize their property. The U.S. Court of Appeals for the Fifth Circuit endorsed an expansive interpretation of critical habitat by upholding the protection of an area that is not only unoccupied but also unsuitable and uninhabitable by the species. "[T]he ramifications of this decision for national land use regulation . . . cannot be underestimated." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 637 (5th Cir. 2017) (Jones, J., dissenting).

The Farm Bureau is an independent, non-governmental, voluntary general farm organization with nearly 6 million member families in all 50 states and Puerto Rico. Established in 1919, the Farm Bureau's primary function is to advance and promote

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae's* intent to file, and have provided either blanket or individual consent to the filing of this brief.

the interests and betterment of farming and ranching; the farming, ranching, and rural community; and the individual families engaged in farming and ranching. This effort involves protecting, promoting and representing the business, economic, social and educational interests of American farmers and ranchers.

NAFO is a trade association that represents owners and managers of over 80 million acres of private forests in 47 states. NAFO was incorporated in March 2008, and has been working aggressively since then to sustain the ecological, economic, and social values of forests, and to assure an abundance of healthy and productive forest resources for present and future generations.

NMA is the national trade association of the mining industry. NMA has more than 300 members, including those who produce most of the nation's coal, metals, industrial and agricultural minerals. The mining industry has a broad impact on the national economy, generating nearly 1.9 million jobs and contributing $225 billion to the U.S. GDP and $45 billion in federal, state, and local taxes each year. A core mission of NMA is to promote practices that foster the environmentally sound development and use of mineral resources.

The *amici curiae* have members that are engaged in timber, agricultural, and mining operations on privately owned property. They will suffer economic injury and deprivation of the full use and enjoyment of their property due to the consequential restrictions on land use activities arising from a designation of their land as critical habitat. These restrictions and

negative effects are even more alarming when, as here, the land is unoccupied by the relevant species and lacks the features making it viable habitat.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress amended the ESA in 1978 to add a narrow definition of critical habitat to restrain the prevailing practice of designating expansive areas of land with no regard to what was actually necessary for species conservation. In doing so, Congress struck a balance between the need to protect habitat for threatened and endangered species and the need to ensure that the exercise of regulatory powers affecting the economic and productive use of land is wielded with focused circumspection.

The application of the ESA is triggered when the Secretary determines that a species is either threatened or endangered. 16 U.S.C. § 1533(a)(1). Concurrent with a listing decision, to the maximum extent prudent and determinable, the Secretary shall "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A)(i) (emphasis added). The Secretary must base any designation upon "the best scientific data available . . . after taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2).

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[2] The *amici curiae* also support the Petition for a Writ of Certiorari in *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Service*, No. 17-74 (July 12, 2017).

Congress did not envision the designation of critical habitat "as far as the eyes can see and the mind can conceive." 124 Cong. Rec. 38,131 (1978). Rather, through the statutory definition of "critical habitat," Congress established clear standards and statutory boundaries. For occupied habitat, the Secretary may designate "specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). For unoccupied habitat, Congress imposed a heightened standard—limiting designations to "specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

In the decision below, the closely divided Fifth Circuit panel upheld the designation of more than 1,500 acres of private forest land (Unit 1) in Louisiana as unoccupied critical habitat for the dusky gopher frog. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 459 (5th Cir. 2016). The U.S. Fish and Wildlife Service (FWS) conceded that Unit 1 only contains one of the three physical or biological features that comprise habitat for the species (ephemeral ponds) and that, in its present state, Unit 1 is "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. 35,118, 35,129 (June 12, 2012). Furthermore, Unit 1 is located across state lines, about 50 miles from existing populations in Mississippi, and natural dispersal of the frogs to the area is not possible. *See id.* at 35,130.

Even if the frogs were introduced into Unit 1, they would not survive.

The Fifth Circuit wrongly held that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations." *Markle*, 827 F.3d at 468. The plain language of ESA Section 4 explicitly limits critical habitat to a subset of "any habitat of such species." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). The Fifth Circuit's decision condones the designation of admittedly unsuitable and uninhabitable land based on the mere presence of one physical feature that, alone, cannot support the dusky gopher frog. This decision sets a remarkably low bar for the designation of critical habitat—no requirement for existing habitat, no requirement for suitability, and no reasonable expectation that the area will be used for the conservation of the species. The Fifth Circuit destroys the statutory distinction between occupied and unoccupied critical habitat and contravenes Congressional intent by granting the Secretary "virtually limitless" power to designate critical habitat. *Markle*, 848 F.3d at 651 (Jones, J., dissenting).

If left unrestrained by this Court, the Fifth Circuit's decision has nationwide implications. A private property owner is barred from obtaining any discretionary federal permits, authorizations, funding, or other agency actions without first being subject to a review to ensure that there will be no destruction or adverse modification of critical habitat. This "consultation" requirement imposes a federal management overlay upon private lands with significant regulatory and economic ramifications under the ESA. *See* 16 U.S.C. § 1536(a)(2). Congress

recognized these implications in 1978 and crafted an "extremely narrow definition of critical habitat" that imposed statutory safeguards to restrain the overbroad assertion of federal regulatory power. 124 Cong. Rec. 38,665 (1978). Review by this Court is necessary to restore the designation of critical habitat to the bounds that Congress intended and explicitly delineated.

ARGUMENT

I. By Bestowing "Virtually Limitless" Power to Designate Critical Habitat, the Fifth Circuit's Decision Raises an Issue of Extraordinary Public Importance

This case presents the central legal issue in unmistakably clear statutory terms—does the use of "any habitat . . . which is then considered to be critical habitat" impose a statutory limitation on the designation of critical habitat? 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). The Fifth Circuit answered this question in the negative, holding that "[t]here is no habitability requirement in the text of the ESA." *Markle*, 827 F.3d at 468. Under this interpretation, the FWS would have unfettered discretion to designate wide swaths of unoccupied lands or waters as "critical habitat" on the mere hope that somehow, some day, the area will transform into actual habitat for the species. There are more than 1,650 species currently listed as threatened or endangered within the United States, with many having actual or historic ranges that encompass multiple states (and federal circuit court boundaries). The nationwide ramifications of such an expansive interpretation warrant this Court's acceptance of the petitions for writ of certiorari to resolve whether the

Fifth Circuit's decision can be reconciled with Congress's clear statutory directive.

A. Critical Habitat Designations Impose Significant Economic and Regulatory Impacts on Landowners Nationwide

The listing of a species as threatened or endangered triggers a panoply of additional protections under the ESA. First is the obligation of the Secretary to designate critical habitat. 16 U.S.C. § 1533(a)(3)(A). In turn, Section 7 of the ESA requires each federal agency to consult with the FWS or National Marine Fisheries Service (NMFS) (collectively, the Services) on any action authorized, funded, or carried out that may affect critical habitat.[3] 16 U.S.C. § 1536(a)(2). The scope of federal agency actions that trigger consultation continues to expand rapidly and includes, for example, the provision of flood insurance and federal loan guarantees. *See Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008); *Buffalo River Watershed All. v. Dep't of Agric.*, No. 4:13-cv-450-DPM, 2014 WL 6837005, at *5 (E.D. Ark. Dec. 2, 2014). During consultation, if FWS or NMFS concludes that the action will destroy or adversely modify critical habitat, then a reasonable and prudent alternative (RPA) to the proposed action is developed to avoid the destruction or adverse modification. 16 U.S.C. § 1536(b)(4)(A). A private party applicant or partner to the federal agency action must typically implement the RPA or be subject to denial of its application or project.

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[3] The relevant regulations define "action" broadly to include the "granting of licenses, contracts, leases, easements, right-of-way, permits, or grants-in-aid" or "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (2016).

These Section 7 consultations impose "[c]onsiderable regulatory burdens and corresponding economic costs [that] are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation." Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10,678, 10,680 (2013). There are significant costs associated with conducting biological surveys and assessments—including multiple site visits, hiring of technical experts, and subsequent analyses—that can reach hundreds of thousands of dollars. Compliance costs for measures to avoid or minimize the effects of the proposed action on designated critical habitat areas can be crippling. The consultation process itself also has economic impacts because it "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." *Id.* at 10,681. Where the federal action authorizes some activity on private land, these costs are borne by the private landowner, not by the federal agency.

The impacts of a critical habitat designation cannot be overstated. Pursuant to its authority under ESA Section 7, during consultation on a requested federal permit, FWS could recommend that no development occur on Unit 1 which would result in $34 million of lost economic opportunity. 77 Fed. Reg. at 35,141. But Unit 1 is concededly "unsuitable as habitat," and is uninhabitable by the dusky gopher frog. *Id.* at 35,129 & 35,132-33. The only way that Unit 1 could benefit the species is if the landowners engaged in large-scale habitat transformation and the frog was forcibly

relocated there—something that the ESA cannot require.[4] 77 Fed. Reg. at 35,123 ("property owners [not required] to undertake affirmative actions to promote the recovery of the listed species").

The specter created by this broad interpretation of what qualifies as critical habitat is unremittingly chilling in its implications for ongoing commercial activities on private property. A critical habitat designation based on a single physical or biological feature in an area that is unoccupied by the species could freeze the operations of that property in perpetuity. The fact that such restrictions are only triggered by a discretionary federal agency action subject to Section 7 consultation adds no comfort. The nexus between federal agency actions and private commercial operations is exceedingly broad, and includes Clean Water Act permitting, land management plans by the Forest Service and Bureau of Land Management, financial assistance and other programs from the National Resources Conservation Service, Small Business Administration loan guarantees, Federal Emergency Management Agency flood insurance, and other Army Corps of Engineers permits.

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[4] Congress included other authorities in the ESA to allow the Secretary to address this circumstance. 16 U.S.C. § 1534(a)(2) (authorizing the Secretary "to acquire by purchase, donation, or otherwise, lands, waters, or interest therein" to conserve fish, wildlife, and plants); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995) ("The Secretary may also find the § 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species.") (emphasis added).

These impacts are not unique to Unit 1, but are occurring nationwide. For example, the government estimated that the designation of all potential critical habitat for the green sturgeon along the West Coast would have an annual economic impact of up to $578 million and affect a variety of activities, including timber sales, irrigation diversions and water conveyance, and other land management actions. 74 Fed. Reg. 52,300, 52,300 & 52,341 (Oct. 9, 2009). The designation of critical habitat for the bull trout is expected to have incremental impacts of $56.3 to $80.9 million over 20 years, and would impact water diversions, timber harvests, livestock grazing, and other floodplain activities. 75 Fed. Reg. 63,898, 63,920 & 63,943-44 (Oct. 18, 2010). The designation of critical habitat for the northern spotted owl could have up to a $6.4 million annual impact due to a decline in timber harvest volumes on federal lands. 77 Fed. Reg. 71,876, 71,946 (Dec. 4, 2012).

The designation of critical habitat, and its attendant regulatory and economic impacts, will become more significant in the future. There are currently more than 1,650 species listed in the United States—with listings in all 50 States and the District of Columbia—but only 742 species have critical habitat.[5] FWS has pending listing decisions on more than a hundred species that require resolution and, if listed, the designation of critical habitat. For those species without critical habitat, the Services have stated that

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[5] FWS, *Listed Species Summary*, https://ecos.fws.gov/ecp0/reports/box-score-report (last visited Aug. 14, 2017); FWS, *Threatened & Endangered Species Active Critical Habitat Report*, https://ecos.fws.gov/ecp/report/table/critical-habitat.html (last visited Aug. 14, 2017).

future designations "will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing." 81 Fed. Reg. 7,414, 7,435 (Feb. 11, 2016).

As recognized by this Court, an over-expansive interpretation of the ESA "imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Sweet Home*, 515 U.S. at 714 (Scalia, J., dissenting). The issue of whether critical habitat is limited to habitat of the species must be resolved because it directly affects how landowners will manage their private lands, dictates what regulatory requirements will apply, imposes substantial economic costs and, sometimes, results in the outright rejection or cessation of ongoing activities.

B. Review Is Needed to Provide Uniform Interpretation of the ESA's Critical Habitat Requirements

This case emphasizes the compelling need for a definitive interpretation of what constitutes critical habitat to ensure consistent implementation nationwide. In recent years, there has been an increasing trend of geographically expansive critical habitat designations. These designated areas span multiple States and will be subject to inconsistent standards depending upon which lower court has jurisdiction.

For example, FWS recently designated 38,954 square miles of critical habitat for the Canada lynx. 79 Fed. Reg. 54,782, 54,782 (Sept. 12, 2014). The designation includes areas of six states in various geographic regions of the United States (Idaho, Maine, Minnesota, Montana, Washington, and Wyoming).[6] Similarly, NMFS has proposed to designate 4,254 miles of critical habitat for the Atlantic sturgeon. *See* 81 Fed. Reg. 35,701, 35,701 (June 3, 2016); 81 Fed. Reg. 36,078, 36,078 (June 3, 2016). The designation would include portions of 28 rivers from Maine to Florida, along with unoccupied habitat upstream of currently impassable dams on several of these river systems.[7]

Until the Fifth Circuit's decision, courts have unanimously found that the designation of unoccupied habitat is a "more onerous procedure" and a "more demanding standard" than the designation of occupied habitat. *E.g.*, *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010); *Cape Hatteras Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event [than] designation of occupied lands."). The Fifth Circuit drastically diverged from these decisions by making it less difficult to designate unoccupied areas as critical habitat, *Markle*, 848 F.3d

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[6] The designation includes areas that fall within the jurisdiction of the U.S. Courts of Appeals for the First, Eighth, Ninth, and Tenth Circuits.

[7] The designation includes areas that fall within the jurisdiction of the U.S. Courts of Appeals for the First, Second, Third, Fourth, and Eleventh Circuits.

at 646 (Jones, J., dissenting), and created considerable uncertainty regarding the procedures and findings the Secretary must make regarding a designation of critical habitat.[8]

Given the Services' increasing reliance upon unoccupied areas to provide for the conservation of listed species, there is an urgent need for this Court to provide a uniform interpretation of the applicable statutory requirements governing the designation of critical habitat.

II. The Fifth Circuit Contravened Explicit Statutory Restrictions on the Designation of Unoccupied Critical Habitat

A. The ESA's Plain Language Limits Critical Habitat to Specific Areas Within Existing Habitat

The decision below gives the Secretary authority to designate almost any land or waterbody within the United States as critical habitat for an ESA-listed species, even in places where the species could not currently survive. As the Fifth Circuit erroneously held, "[t]here is no habitability requirement in the text of the ESA or the implementing regulations," and the imposition of a habitability requirement would impose an "extra-textual limit on the designation of unoccupied land." *Markle*, 827 F.3d at 468 (emphasis added). This

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[8] In 2014, FWS proposed to designate critical habitat for the yellow-billed cuckoo. 79 Fed. Reg. 48,548 (Aug. 15, 2014). The proposed designation includes areas in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Texas, Utah, and Wyoming thereby directly implicating the split of authority between the Fifth and Ninth Circuits.

conclusion contravenes the ESA's explicit statutory requirements.

The plain language of Section 4 clearly delineates "critical habitat" as a subset of "habitat." The Secretary can only "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). Thus, "[w]hatever is 'critical habitat,' according to this operative provision, must first be 'any habitat of such species.'"[9] *Markle*, 848 F.3d at 640 (Jones, J., dissenting). This "clear habitability requirement" dictates the scope of the narrower designation of occupied and unoccupied areas as critical habitat for a species.

This Court has emphasized that "[t]he starting point in discerning congressional intent is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). And, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* As the operative text in the ESA, the use of "habitat" in Section 4 must be construed to have meaning. *E.g.*, *TRW Inc. v.*

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[9] Other provisions indicate that Congress explicitly focused on conservation of species' habitat. *E.g.*, 16 U.S.C. § 1531(b) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, ...") (emphasis added); 16 U.S.C. § 1536(a)(2) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to . . . result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . .") (emphasis added).

Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citation omitted).

Properly interpreted, critical habitat can only be designated in areas that are currently habitat for the species. While not defined in the ESA, "habitat" is commonly understood to be:

> the resources and conditions present in an area that produce occupancy—including survival and reproduction—by a given organism. Habitat is organism-specific; it relates the presence of a species, population, or individual (animal or plant) to an area's physical and biological characteristics. Habitat implies more than vegetation or vegetation structure; it is the sum of the specific resources that are needed by organisms. Wherever an organism is provided with resources that allow it to survive, that is habitat.

Linnea S. Hall, *et al.*, *The Habitat Concept and a Plea for Standard Terminology*, 25(1) Wildlife Soc'y Bulletin 173, 175 (1997); John M. Frywell, *et al.*, *Wildlife Ecology, Conservation, & Mgmt.* 427 (3d ed. 2014) ("The place where an animal or plant normally lives, often characterized by a dominant plant form or physical characteristic (e.g. soil habitat, forest habitat)."). For areas that are not currently occupied, this habitability requirement ensures that the application of the ESA does not create illogical results. As in the present case, it is axiomatic that an area where the dusky gopher

frog cannot survive (even if relocated there) cannot provide a conservation benefit to the species. By divorcing "habitat" from "critical," the Fifth Circuit's reasoning allows almost any area to be designated as critical habitat with no restrictions on scope or the attendant regulatory impositions on affected landowners. This is contrary to the explicit statutory safeguards that Congress provided.

B. The Legislative History Demonstrates That Congress Intended to Limit Critical Habitat to a Subset of the Species' Habitat

As enacted in 1973, the ESA did not contain a definition of critical habitat or specify how it was to be designated.[10] In 1978, the Services promulgated regulations that defined "critical habitat" as:

> any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. . . . Critical habitat may represent any portion of the present

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[10] The only reference to critical habitat in the 1973 ESA was the prohibition on federal agencies taking action that "jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." Endangered Species Act of 1973, Pub. L. No. 93-205 § 7, 87 Stat. 884, 892. Congress intended that critical habitat would be acquired and protected pursuant to ESA Section 5. *Id.* § 5, 87 Stat. 889; H.R. Rep. No. 93-740, at 25 (1973) ("Any effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire habitat which is critical to the survival of those species.") (emphasis added).

> habitat of a listed species and may include additional areas for reasonable population expansion.

43 Fed. Reg. 870, 874-75 (Jan. 4, 1978) (emphasis added). Shortly thereafter, this Court enjoined the construction of the Tellico Dam to protect the snail darter and prevent the destruction of its critical habitat. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."). In response to these events, and the significant economic implications, Congress amended the ESA to explicitly define critical habitat and limit the scope of such designations.

Congress's efforts demonstrate a clear intention that critical habitat designations are limited to areas that are habitable by the species and that unoccupied habitat should only be designated sparingly based upon heightened criteria. For example, House Bill 14104 defined unoccupied critical habitat as:

> specific areas periodically inhabited by the species which are outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act (other than any marginal habitat the species may be inhabiting because of pioneering efforts or population stress), upon a determination by the Secretary at the time it is listed that such areas are essential for the conservation of the species.

124 Cong. Rec. 38,154 (1978) (emphasis added). The House Committee on Merchant Marine and Fisheries

noted that efforts to define critical habitat were driven by the concern that "the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat."[11] H.R. Rep. No. 95-1625, at 25 (1978) (emphasis added). Instead, the Committee directed the Secretary to "be exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species." *Id.* at 18 (emphasis added).

The corresponding Senate Bill 2899 also included a definition of unoccupied critical habitat, which limited it to:

> specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this act, into which the species can be expected to expand naturally upon a determination by the Secretary at the time it is listed, that such areas are essential for the conservation of the species.

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[11] During floor debate on the House Bill, Representative Bowen stated that "I believe the majority of the House is in agreement on that, that the Office of Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species." 124 Cong. Rec. 38,131 (1978) (emphasis added).

124 Cong. Rec. 21,355 (1978) (emphasis added).[12] For unoccupied areas, the Senate Committee on Environment and Public Works stated that "[t]here seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species['] continued survival."[13] S. Rep. No. 95-874, at 10 (1978) (emphasis added).

The final bill passed by Congress included "[a]n extremely narrow definition of critical habitat, virtually identical to the definition passed by the House." 124 Cong. Rec. 38,665. That definition remains in effect today. The legislative history clearly demonstrates that Congress was focused on habitat of species which could then be designated as either occupied or unoccupied critical habitat if the area satisfied the relevant definitional criteria. *Markle*, 848 F.3d at 642 n.4 (Jones, J., dissenting) ("uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat"). Contrary to the

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[12] Regarding his amendment, Senator McClure explained that "this is in response to the difficulty of how large an area should there be established and if that species then expands beyond that area must humans then be displaced in that area." *Id.*

[13] In explaining the role of critical habitat, Senator Garn stated that "[w]hen a Federal land manager begins consideration of a project, or an application for a permit, it is essential that he know, not only of the existence of an endangered species, but also of the extent and nature of the habitat that is critical to the continued existence of that species. Unless he knows the location of the specific sites on which the endangered species depends, he may irrevocably commit Federal resources, or permit the commitment of private resources to the detriment of the species in question." 124 Cong. Rec. 21,575 (1978) (emphasis added).

Fifth Circuit's conclusion, this habitability requirement was understood by Congress at the outset and incorporated into the operative provisions of the ESA.

C. To Be Essential for the Conservation of the Species, an Unoccupied Area Cannot Be Based on the Presence of a Single, Non-Determinative Feature

The Fifth Circuit found that "only occupied habitat must contain all of the relevant [physical or biological features]," and upheld the designation of the unoccupied Unit 1 despite it only containing one of the three features that are essential to the conservation of the species. *Markle*, 827 F.3d at 468 & 472 n.20. The decision illogically establishes that the same conditions—a lack of all relevant physical or biological features—can justify the designation of an unoccupied area, but not an occupied area, as critical habitat. This is contrary to Congressional intent and erroneously lowers the bar for designating unoccupied critical habitat.

The ESA, its legislative history, and court precedent all unquestionably demonstrate that "an unoccupied critical habitat designation was intended to be different from and more demanding than an occupied critical habitat designation." *Markle*, 848 F.3d at 648 (Jones, J., dissenting). In defining critical habitat, Congress explicitly distinguished between occupied and unoccupied habitat. Occupied habitat requires the presence of "features [that are] essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Conversely, unoccupied habitat requires "specific areas . . . [that] are essential to the conservation of the species." *Id.* § 1532(5)(A)(ii)

(emphasis added). From a biological perspective, the use of "features" for occupied habitat and "areas" for unoccupied habitat is inherently logical. An already occupied area is, by definition, habitat for the species, so a focus on physical or biological features ensures that the critical components of that habitat are identified. Because unoccupied areas may or may not have habitat, the analysis must expand beyond mere features to consider the habitability of the area as a whole, otherwise the designation would provide no conservation benefit to the species.

The use of these disparate statutory terms—"features" versus "areas"—clearly connotes that different standards apply to the designation of occupied and unoccupied habitat. *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citation omitted). To give these terms independent meaning, the designation of unoccupied habitat must require more than the presence of a single feature.

Disregarding this statutory construct, the Fifth Circuit contradicted all relevant precedent by making "it easier to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." *Markle*, 848 F.3d at 646 (Jones, J., dissenting). In contrast, the Ninth Circuit stated:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of

> unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Ariz. Cattle Growers', 606 F.3d at 1163; *see also Home Builders*, 616 F.3d at 990 (designation of unoccupied habitat "is a more demanding standard than that of occupied critical habitat"). The district courts have also concluded that the designation of unoccupied habitat requires more than the standard for designating occupied areas. *E.g.*, *Cape Hatteras*, 344 F. Supp. 2d at 119 ("with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential"); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("ESA imposes a more onerous procedure on the designation of unoccupied areas"); *Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("more demanding [standard] than that of unoccupied habitat"). The Fifth Circuit's anomalous decision is contrary to established case law, and subverts Congressional intent and the ESA statutory criteria which impose a heightened standard for the designation of unoccupied critical habitat.[14]

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[14] In adopting the definition of "critical habitat" Congress sought to constrain the ability of the Secretary to designate unoccupied habitat. The Senate found that there is "little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species[']s continued survival." S. Rep. No. 95-874 at 10 (emphasis added). Likewise, the House directed the Secretary to be "exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species." H.R. Rep. No. 95-1625 at 18 (emphasis added).

Furthermore, the Fifth Circuit's decision extinguishes the statutory criterion that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). As informed by the definition of "essential," the designated habitat must be "of the utmost importance" or "indispensable" for the conservation of a species. *Merriam-Webster's Collegiate Dictionary* 427 (11th ed. 2005). Congress clearly understood that its use of "essential" would impose a stringent limitation on the areas that could be designated as critical habitat.[15] An area that only contains a single feature, which by itself would not sustain the species, cannot be "essential." The operative effect of this term is particularly apparent where, as here, the unoccupied area is not connected to occupied areas, would require extensive modifications and annual maintenance to become suitable habitat, and is not subject to current or anticipated restoration efforts or conservation measures. *Markle*, 827 F.3d at 481 (Owens, J., dissenting). By upholding the designation of Unit 1, the Fifth Circuit removed any principled limitation on the Secretary's ability to designate critical habitat and rendered this authority "virtually limitless."[16] *Markle*, 848 F.3d at 649-51

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[15] As Representative Duncan explained, "I think that in order to be consistent with the purposes of this bill to preserve critical habitat that there ought to be a showing that it is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it." 124 Cong. Rec. 38,154 (emphasis added).

[16] In part, the Fifth Circuit justified its decision based upon a then-existing regulatory requirement that the Secretary could only designate an unoccupied area as critical habitat "when a designation limited to its present range would be inadequate to

(Jones, J., dissenting). This is contrary to what Congress intended and what the ESA explicitly commands.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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ensure the conservation of the species." *Markle*, 827 F.3d at 470 (citing 50 C.F.R. § 424.12(e)). The Services have subsequently deleted this requirement from their regulations. *See* 81 Fed. Reg. at 7,434.

RECORD
AND
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Supreme Court of the United States

WEYERHAEUSER CO.,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET. AL.,

Respondents,

MARKLE INTERESTS, LLC, ET AL.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET. AL.,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING THE MARKLE INTERESTS PETITION FOR CERTIORARI

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August 14, 2017

QUESTIONS PRESENTED

The petition presents two questions for review:

1. Can 1,500 acres of private land that isn't used or occupied by a species really be considered "critical habitat" that is "essential to the conservation" of that species under the Endangered Species Act?

2. If so, what part of the Constitution authorizes that sort of thing?

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INTEREST OF THE *AMICUS CURIAE*[1]

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This case concerns Cato because it implicates the ability of government to burden private citizens' property rights through actions that violate the Constitution's enumeration and separation of powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers created a system of government that would protect the people by limiting power of government through structural design. As Madison put it: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people." The Federalist No. 51 (Madison).

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[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief. Consents from all parties but the government are lodged with the Clerk; the solicitor general consented separately. No party's counsel authored this brief in any part and nobody but *amicus* funded its preparation or submission.

The U.S. Fish and Wildlife Service (FWS) disregarded both of these liberty-protecting structural safeguards when it designated petitioner's property (Unit 1) as "critical habitat" of the "dusky gopher frog" (Frog). While Congress has delegated the FWS power to designate critical habitat in the Endangered Species Act (ESA), that power is not unlimited. The ESA defines criteria for when the FWS may designate property as critical habitat of a listed species. This includes property that is both occupied and unoccupied, but the ESA's plain meaning still requires the property to be the species' *habitat*. Unit 1 is by no means the Frog's habitat and thus cannot be its "critical habitat."

The FWS's interpretation of what is "essential" habitat is unmoored from all bounds of reason. Thus, the FWS has interpreted—rewritten—the ESA to enlarge its power to reach property Congress never gave it power to reach. This aggrandizement of the FWS's power—and the precedent it sets for future land regulation throughout the United States—will have major economic and political consequences for landowners. The Constitution's separation of powers does not let executive agencies amend statutes in this way.

Further, if the FWS's expansive definition of "critical habitat" is deemed a valid exercise of administrative discretion, then that expansive reading of the statute goes beyond the strictures of the Commerce and Necessary and Proper Clauses. Allowing federal agencies to take jurisdiction over essentially any piece of land pursuant to the ESA would be an improper expansion of federal power into unrestrained land-use regulation, a traditional state activity. The Commerce Clause currently supports the comprehensive ESA

scheme to protect species—and critical-habitat designation can be reasonably connected to that scheme as a necessary and proper extension of the Commerce Clause. But how far can that go? Can we link one power to another in an endless "house that Jack built" until there's federal regulation of land that is *not* critical habitat? *United States v. Comstock*, 560 U.S. 126, 150 (2010) (Kennedy, J., concurring). No: the regulation of Unit 1 is neither necessary nor proper. It isn't necessary because Unit 1 doesn't play any role in the Frog's conservation, and it isn't proper because it infringes on states' sovereign regulation of land use.

The mere existence of land does not constitute "economic activity" under the Commerce Clause. Otherwise, Congress would have jurisdiction over all land in the country *qua* land, regulating the states in the same way it regulates federal enclaves. Instead, it's the activities that take place on the land, such as Mr. Filburn's farming, that determine whether Congress can regulate. *Wickard v. Filburn*, 317 U.S. 111 (1942). Roscoe Filburn was farming his land, which is what allowed Congress to regulate it. *Id.* at 114-15 The proper analogy here would be to the question whether Congress could regulate land that Mr. Filburn wasn't farming and couldn't farm—a non-habitat for wheat, if you will—pursuant to a comprehensive scheme of agricultural regulation. Such a regulation of "Mr. Filburn's Impossible Farm" would be both unnecessary and improper, just as the regulation of Unit 1 is here.

In sum, the district court and Fifth Circuit sanctioned a rewriting of the ESA when it granted *Chevron* deference to the FWS. The Court should take this case and reaffirm that the federal government cannot disregard the Constitution's structural limits.

ARGUMENT

I. THE COURTS BELOW SHOULD NOT HAVE DEFERRED TO THE GOVERNMENT'S INTERPRETATION OF THE ESA

The "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist, No. 47 (Madison). To protect against this accumulation of power, the Constitution vests distinct powers in three separate branches, *see Dep't of Transp. v. Ass'n. of Am. R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment), and each branch has "the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist, No. 51 (Madison). This Court has confirmed these basic maxims repeatedly. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

Yet administrative agencies like the FWS regularly evade many of these constitutional checks and wield vast power "over our economic, social, and political activities." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (citations omitted). Many observers, including members of this Court, believe that *Chevron* deference is plays a big part in this breakdown in constitutional design. *See e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("Interpreting federal statutes—including ambiguous ones administered by an agency—calls for . . . exercise of independent judgment. *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what

they believe is the best reading of an ambiguous statute in favor of an agency's construction.") (internal quotation marks and citation omitted); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that judicial deference doctrines "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.").

Neither petitioners nor *amicus* ask the Court to overturn *Chevron* here. By ignoring key parts of the ESA in regulating Unit 1 as the Frog's "essential" critical habitat, however, the FWS stretched an already overextended *Chevron* past its limits. The lower courts then abdicated their responsibility to enforce the limits of deference, demonstrating how deference to agencies frustrates the separation of powers. It is all the more important for the Court to take this case and ensure that lower courts apply the doctrine properly.

A. The FWS Interpretation of "Essential" Is Unreasonable

While the Court has allowed Congress wide latitude in delegating its authority to executive agencies, it is also axiomatic that, for *Chevron* deference to apply, a court must first review an agency's construction of the statute to determine whether Congress has directly spoken to the precise question at issue. Because, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984). Otherwise, administrative agencies would be unconstitutionally making law.

The reviewing court must use "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, to determine whether a statute is ambiguous. This Court has repeatedly held that "in all statutory construction, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (citation, brackets, and internal quotation marks omitted); *see also, Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (noting that applying the plain-meaning rule is a "fundamental canon of statutory construction"). Furthermore, the ordinary meaning of the statutory text is found not only through the words of the statute, but also through the context in which those words are used within the statutory framework. *See* Pet. App. at C-20; *See also, King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[O]ftentimes the meaning . . . of certain words or phrases may only become evident when placed in context . . . [so] we must read the words in their context and with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions.") (internal quotation marks and citations omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole.").

Both the district court and panel majority below ignored the context in which the ESA defines "critical habitat." The ESA defines critical *habitat* in two ways:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) *essential to the*

> *conservation of the species* and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are *essential for the conservation of the species*.

16 U.S.C. § 1532(5)(A)(i)–(ii) (emphasis added). While both definitions are distinct in that both identify different subsets of land—occupied and unoccupied—they have something very important in common: both require the designated property to be *habitat* of the species. It is then, and only then, that habitat can become critical. *See* Pet. Brief at 18-24; *see also* Pet App. C-11-23. By reading out this "habitability requirement"—one of the key limiting features of the ESA—the courts below have turned this provision of the statute into little more than a blank slate for the FWS to fill in its jurisdiction.

If the panel majority and district court below would have adhered to these foundational principles of statutory construction, this case could have been easily disposed of by simply interpreting the text, context, and structure of the ESA. But both courts below focused on a narrow provision of the ESA to find ambiguity—and, in the process, sanctioned a definition of "essential" that went beyond any bounds of reason.

Chevron mandates that courts accept an agency's reasonable construction of an ambiguity in a statute that the agency is responsible for administering. *Chev-*

ron, U.S.A., Inc., 467 U.S. at 842-843. But, "[e]ven under this deferential standard . . . agencies must operate within the bounds of reasonable interpretation." *Michigan*, 135 S. Ct. at 2707 (internal quotation marks and citation omitted).

The government argues—and both courts below upheld—that the term "essential" in the ESA gives it authority to regulate private land that is neither occupied by the Frog nor contains the essential features necessary for the species to occupy the land. *See* Pet. Brief at 22. But how can something with no connection to a species be "essential"? As the petitioners, the en banc dissent, and the panel dissent point out, this is simply an implausible reading of the statutory text—and any definition of the word "essential." *See id.*; *see also* Pet. App at C-21-22; Pet. App. at A-57-59 (noting that the FWS's interpretation of "essential" "goes beyond the boundaries of what 'essential' can reasonable be interpreted to mean."). If the FWS is free to define private land as "essential" for the conservation of a species when that land is "not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without modification; and does not support the existence or conservation of the species in any way[,]"there is simply no meaningful limit on the jurisdiction of the FWS under the ESA. *See* Pet. Brief at 23; Pet. App. at C-31-38, A-51-52.

B. When a Statutory Construction Has Major Political and Economic Consequences, the Court Requires a Clear Statement from Congress before It Will Apply *Chevron*

This case could have—and should have—been easily resolved by simply applying the text of the ESA to strike down the FWS's regulation of Unit 1. Deference

under *Chevron* should have never applied to the FWS's regulation because the statute's plain meaning is clear, and the FWS's interpretation of "essential" is unreasonable. But there is another fundamental reason this Court should take this case and overrule the lower court's application of *Chevron*: if the ESA allows the FWS to define private land that has—at best—hypothetical *de minimis* connection to the species as "essential," Congress would have made that clear.

When determining whether to apply *Chevron* deference to agency interpretations of statutes, this Court has withheld deference where the agency is regulating beyond mere "interstitial matters" without clear congressional approval. In these situations, non-delegation is presumed because Congress is "more likely to have focused upon, and answered, major questions." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986); *see also*, William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 288 (2016) ("[The] Supreme Court has carved out a potentially important exception to delegation, the major questions cannon. Even if Congress has delegated an agency general rulemaking or adjudicatory power, judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions.").

Several of this Court's precedents have confirmed this "major questions" doctrine over the past 25 years:

- *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (withholding deference where it was "highly unlikely that Congress would leave the determination of whether an industry will

be entirely, or even substantially, rate-regulated to agency discretion.").

- *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (withholding deference where the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").
- *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (withholding deference because "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act]'s registration provision is not sustainable").
- *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("When an agency claims to discover in a long extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. [The Court] expect[s] Congress to speak clearly if it wishes to assign to an agency decision of vast economic and political significance.") (internal quotations and citations omitted).
- *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (withholding deference and holding that where the issue was "a question of deep economic and political significance; had Congress wished to assign that question to an agency, it surely would have done so expressly.").

While there has been no set standard for when this "major questions" principle applies, from these cases a

broad theme in which deference to an agency interpretation is inappropriate has emerged. Thus, where a regulation implicates questions of "vast economic or political significance," or where an agency is trying to aggrandize its power though new interpretations of long standing statutory provisions to effectuate an enormous and transformative expansion of the agency's regulatory authority, and Congress has not clearly spoken, deference should be withheld. This case is the poster-child for applying this doctrine.

The ESA requires the FWS to conduct a cost-benefit analysis and "take into consideration the economic impact . . . of specifying any particular area as critical habitat[.]" 16 U.S.C. § 1533(b)(2). During the FWS analysis of Unit 1, it considered "lost economic efficiency associated with residential and commercial development and public projects and activities." Final Rule, 77 Fed. Reg. 35118 (June 12, 2012). After concluding its analysis, the government recognized the Unit 1 landowners "have invested a significant amount of time and dollars into their plans to develop this area." Indus. Econ., Inc., *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, http://bit.ly/2hPhQrF (last visited August 1, 2017); Pet. Brief at 11-12. This regulation alone, the FWS found, could cost the Unit 1 landowners $33.9 million over 20 years. *See id.* at 4-3, 4-4, 4-7 (¶¶ 73-77, 87); Pet. Brief at 13.

If the regulation of one small area in Louisiana could have an economic impact of $33.9 million to one set of landowners, one can only imagine how many billions of dollars this could cost landowners in the aggregate. Indeed, if the FWS definition of "essential" stands—that private land only needs to contain one of

a multitude of possible "primary constituent elements" (PCEs)—then vast portions of the country's private land will be subject to prohibitive devaluation. *See* Pet. Brief at 33; *see also*, Pet. App at C-36 (noting that the panel majority's decision gives the government "virtually limitless" power to regulate private land as critical habitat); Pet. App. at A-57 ("The Government's, and the majority opinion's, interpretation of 'essential' means that virtually any part of the United States could be designated as "critical habitat."). This is because, as the Fifth Circuit en banc dissent points out, there is an extensive list of PCEs that could potentially subject private land—which traditionally is regulated by state governments—to federal regulation.

These potential PCEs include, but are not limited to: "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and "natural light regime[s] within the coastal dune ecosystem." Pet. App. at C-37. Further, by allowing the FWS to use only one of these PCEs to designate private land, "there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* Under the FWS interpretation of the ESA, "the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features." *Id.* At bottom, this aggrandizing interpretation "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id.* This is not some parade of horribles argument. Indeed, the government, after the Fifth Circuit's decision, has now codified this single PCE standard into a generally applicable rule to list land as critical habitat. *See Listing Endangered*

and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016); Pet. Brief at 36.

This unprecedented power grab allows the federal government to expand its jurisdiction to regulate private land by interpreting a single word—"essential"—in a statute that has been on the books for over forty-years. Has this power just been dormant all that time? If so, this is truly an "elephant" hiding in a "mousehole." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes."); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (SWANCC) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

Whether the FWS ignores or reinterprets key ESA terms to reach patently non-covered private property, what it's really doing is creating an expansive new law that Congress never passed. By sanctioning this aggrandizement of the agency's power in a 40-year-old statute, the courts below have allowed the executive branch to effectively rewrite the ESA. This will have major economic and political consequences for private property owners in this country.

II. THE CONSTITUTION PERMITS NEITHER CONGRESS NOR AN EXECUTIVE AGENCY TO REGULATE EITHER "MR. FILBURN'S IMPOSSIBLE FARM" OR UNIT 1

As mentioned *supra*, "Mr. Filburn's Impossible Farm" is a hypothetical piece of land that Mr. Filburn of *Wickard v. Filburn* fame doesn't farm and can't farm. Similarly, Unit 1 is a piece of "critical habitat" that the Frog doesn't live on and "cannot sustain the species without modification." Pet. Brief at 23. Both pieces of land are outside Congress's jurisdiction under the Commerce and Necessary and Proper Clauses.

The FWS interpretation of the ESA does not just stretch *Chevron* to the breaking point, it oversteps constitutional limits. An agency's interpretation of a statute passed pursuant to the Commerce and Necessary and Proper Clauses is of course cabined by those clauses' reach. Just as it would be improper to allow an agency to interpret the statutory phrase "essential to health care" as to allow for a regulatory individual mandate, *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 559-61 (2012), it would be improper to allow the FWS to interpret "essential to the conservation of the species" as to allow the regulation of land that is not in fact habitat.

A. Unit 1 Is Not Habitat for the Frog, So It Is Noneconomic and Noncommercial under the ESA

The ESA regulates land and activities that are necessarily and properly connected to the central object of the statute: the species themselves. The ESA cannot constitutionally reach beyond those limits. Otherwise,

it would be a general land-use-regulation statute, unmoored from any constitutional foundations. Unit 1 is not habitat for the Frog. It is thus beyond the ESA's regulatory reach under the Commerce and Necessary and Proper Clauses. That's not to say that Unit 1 couldn't be regulated by a different act of Congress—perhaps it could—but a different act of Congress is not before this Court. For the same reasons that the Agricultural Adjustment Act of 1938 could not constitutionally reach Mr. Filburn's Impossible Farm, the ESA cannot reach Mr. Frog's Impossible Habitat.

The Constitution allows Congress to "regulate Commerce . . . among the states" U.S. Const. art. I, § 8, as well as do those things "necessary and proper for carrying into Execution" the power to regulate commerce. U.S. Const. art. I, § 8, cl. 18. While this Court has broadly construed this power, *see, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942), the clause has limits. This Court made that clear in *Lopez*. In that case, the Court outlined "three broad categories of activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). These categories include: 1) the regulation of the channels of interstate commerce; 2) the regulation of the instrumentalities of, objects in, and persons engaged in interstate commerce; and 3) the regulation of activities that have substantial effects on interstate commerce. *Id.* Focusing on prong three, the *Lopez* majority struck down a federal statutory provision banning the mere possession of a gun in a school zone, holding that the "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567; *see also*, *United States v. Morrison*, 529 U.S. 598, 613 (2000) (overturning the

Violence Against Women Act because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."). Thus, the connection between the regulated intrastate "activity" and interstate commerce must be "economic." *See id*; *see also*, *NFIB*, 567 U.S. at 550 (2012) ("The power to regulate commerce presupposes the existence of commercial activity to be regulated.").

A piece of land's mere existence does not constitute "economic activity" under the Commerce Clause. Otherwise, the Constitution would allow comprehensive land-use regulation without any connection to interstate commerce. As the Court said—or at least strongly implied—in *SWANCC*, 531 U.S. 159, merely using property, with little connection to interstate commerce, is not regulable economic activity under the Commerce Clause. In that case, similar to what the FWS has done here, the U.S. Army Corps of Engineers (Corps) claimed jurisdiction over non-federal property (an abandoned gravel and sand pit with permanent and seasonal ponds) as a "water of the United States" due to the presence of migratory birds. In avoiding the constitutional question, this Court operated under the "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority" by allowing the Corps to claim "jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id.* at 172-73, 173; Pet. Brief at 37. The Court was concerned that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

The FWS claim of jurisdiction over Unit 1 is similarly expansive in that it seeks jurisdiction over something that is not economic activity. Even if land use alone could be considered economic activity, it would not have a substantial effect on interstate commerce because that commerce—the Frog, the original object of regulation—has no connection to Unit 1: the land is "not near areas inhabited by the species; cannot sustain the species...and does not play any supporting role in the existence of the current habitat for the species." Pet. App. at C-31-38; A-51-52.

Apparently recognizing this flaw in the FWS jurisdictional claim, the district court and Fifth Circuit relied on the comprehensive-scheme approach to uphold the regulation of Unit 1. *See* Pet. App. at A-40. But the comprehensive scheme test has never been used to regulate *non*economic, *non*commercial activity that might have an effect on interstate commerce such as land use in general. *See, e.g., NFIB*, 567 U.S. at 548-61 (holding that the comprehensive Affordable Care Act did not authorize the individual insurance mandate as regulation of noneconomic, noncommercial activity under the commerce power). If the government has that power, the Necessary and Proper Clause is the only constitutional provision that allows it—but neither of the courts below addressed that clause in any detail.

B. The Regulation of Unit 1 Is Neither Necessary Nor Proper

Under the Constitution, Congress can "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers. Art. I, § 8, cl. 18. Although "this power gives Congress authority to legislate on that vast mass of incidental powers which must be involved in the constitution, it does not license

the exercise of any great substantive and independent power[s] beyond those specifically enumerated." *NFIB*, 567 U.S. at 559 (internal quotation marks and citations omitted). Instead, it is "merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant." *Id.*

As this Court noted in *NFIB*, its jurisprudence under this clause has been "very deferential to Congress's determination that a regulation is 'necessary,'" but it has also "carried out [its] responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution." *Id.* "Such laws," moreover, "which are not consist[ent] with the letter and spirit of the constitution, are not proper [means] for carrying into execution Congress's enumerated powers." *Id.* And when these laws are not in that spirit, the Court noted, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Id.* (citing *Printz v. United States*, 521 U.S. 898, 924 (1997) (quoting The Federalist No. 33, at 204 (Hamilton)).

1. The Regulation of Unit 1 is Not Necessary

In *McCulloch*, the first case to address is the meaning of the Necessary and Proper Clause. Chief Justice John Marshall's opinion outlined a broad definition of necessity that later courts would take to mean "convenient, or useful." *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819). In responding to critics of his opinion, however, Marshall denied that this was the case: "The court does not say that the word 'necessary' means whatever may be 'convenient' or 'useful.' And when it uses 'conducive to,' that word is associated with others

plainly showing that no remote, no distant conduciveness to the object, is in the mind of the court." John Marshall, A Friend to the Union No. 2, in John Marshall's Defense of McCulloch, v. Maryland 78, 100 (Gerald Gunther ed., 1969). Nevertheless, the broad, deferential interpretation of "necessary" has held its ground. *See NFIB*, 567 U.S. at 558-60.

But members of this Court have questioned that construction of necessity. In his concurring opinion in *Comstock*, Justice Alito objected to the Court's abdication of its judicial duty to fully analyze what "necessity" consists of: "Although the term 'necessary' does not mean 'absolutely necessary' or indispensable, the term requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress. . . . And it is an obligation of this Court to enforce compliance with that limitation.'" *Comstock*, 560 U.S. at 158 (2010) (Alito, J. concurring) (quoting *McCulloch*, 17 U.S. at 415); *see also*, *id* at 152 (Kennedy, J. concurring) (concluding that the necessary prong of the Necessary and Proper analysis "can be put into a verbal formulation that fits somewhere along a causal chain of federal powers . . . the Constitution does require the invalidation of congressional attempts to extend federal powers in some instances.").

Nevertheless, even if the test gives great deference to Congress's power, this case does not pass muster. Indeed, there is absolutely no need to regulate Unit 1 to preserve the ESA or any of the species it protects, much less a necessary one. It would not be "useful" or "convenient" to regulate Unit 1, because it plays "no part in the conservation" of the Frog. *See* Pet. App. at A-51. Moreover, Unit 1's "biological and physical char-

acteristics will not support a dusky gopher frog population." *Id*; *see also id.* at C-4 ("The panel opinion...approved an unauthorized extension of ESA restrictions to 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connect in any way to the [dusky gopher frog]."). Thus, for the very same reason that the FWS statutory interpretation of "essential" is problematic—as applied to Unit 1, or any other land with attenuated connection to a species—the idea that it is necessary to regulate Unit 1 to protect the Frog is equally so.

2. The Designation of Unit 1 Is Not Proper

McCulloch also addressed the propriety prong of the Necessary and Proper Clause. The means used to carry out incidental powers "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *McCulloch*, 17 U.S. at 421. Thus, this analysis must consider whether the law—or in this case, the regulation—infringes on state sovereignty. *See Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., concurring) ("No law that flattens the principle of state sovereignty, whether or not 'necessary,' can be said to be 'proper.'"); *Comstock*, 560 U.S. at 155 (Kennedy, J., concurring) (noting "[n]or is [this] a case in which the exercise of national power intrudes upon functions and duties traditionally committed to the State" in upholding the law as proper.) (citing *Lopez*, 514 U.S. at 580-581); *Raich v. Gonzales*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) ("[A law is not] proper for carrying into Execution the Commerce Clause [w]hen [it] violates [a constitutional] principle of state sovereignty.") (internal quotation marks and citation omitted); *see also* Gary Lawson & Patricia

Granger, *The "Proper Scope" of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 301- 08 (1993).

If this regulation, and the precedent it sets, stands, much of private land in this country is potentially subject to federal regulation. As has been pointed out, the single PCE rule gives the federal government almost "limitless power" to "regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power." Pet. Brief at 33. That's because almost any land or water will contain at least one of the PCEs the FWS uses to evaluate critical habitat. Judge Owen's warning in dissent from the Fifth Circuit's majority opinion bears repeating:

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it.

Pet. App. at A-57. Thus, through this regulation—and the forthcoming regulations that will no doubt come from the new generally applicable power that this regulation creates—the federal government will continue to impinge on the states' traditional police power to regulate land and water use. To say the least, that's not a proper means of carrying into execution the commerce power.

CONCLUSION

The FWS regulation at issue here goes beyond any power Congress has delegated it under the ESA. Even if the Constitution allows such expansive delegations, they must be cabined by courts exercising their duty to police agencies when they step outside of the statute. This is especially true when the agency oversteps statutory bounds into unconstitutional territory. Mr. Filburn's Impossible Farm and Mr. Frog's Impossible Habitat are both outside Congress's regulatory authority. This case represents significant disregard for the Constitution's separation of powers and enumerated powers, and thus warrants this Court's review.

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In the

Supreme Court of the United States

MARKLE INTERESTS, L.L.C., *ET AL.*,
Petitioners,

v.

U.S. FISH & WILDLIFE SERVICE, *ET AL.*,
Respondents.

WEYERHAEUSER COMPANY,
Petitioner,

v.

U.S. FISH & WILDLIFE SERVICE, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species." Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. The questions presented are as follows:

1. Does the deference given by the court below to an unelected bureaucracy violate separation of powers principles?
2. Did the court below even properly apply existing deference doctrine?
3. Is interpretive deference to an unelected agency even more problematic when the underlying statute itself presses the limits of Congress's power to regulate commerce among the states?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principle at issues in this case that the legislative powers delegated to the national government are vested in a Congress elected by the people, not in an unelected bureaucracy, and that the power to interpret the law is vested in the judiciary, not an unelected bureaucracy. The Center has previously participated in a number of cases before this Court addressing related issues, including *U.S. Dep't of Trans. v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014); and *Rancho Viejo, LLC v. Norton*, 540 U.S. 1218 (2004).

SUMMARY OF ARGUMENT

As several members of this Court have recently acknowledged, the doctrines giving deference to unelected administrative agencies raise serious separation of powers constitutional concerns. The problem is exacerbated when, as here, the courts do not apply step one of *Chevron* with sufficient rigor, and further

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

exacerbated when the particular application of the underlying statute is itself constitutionally suspect quite apart from questions of deference. Review by this Court is warranted to address these significant constitutional concerns.

REASONS FOR GRANTING THE WRIT

I. Doctrines Giving Deference to Unelected Administrative Agencies, Including the *Chevron* Deference Doctrine Relied on By the Court Below, Are Eroding Foundational Separation-of-Powers Principles.

Several members of this Court have recently recognized the risk posed to the Constitution's core separation of power principles by various doctrines of deference to the unelected federal bureaucracy. *Auer* deference, for example—the doctrine that requires deference to an agency's interpretation of its own regulations—appears to be in this Court's crosshairs, with even the author of the opinion that gave its name to the doctrine announcing just two years ago that he would be abandoning the doctrine. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in judgment) (announcing that he would be "abandoning" the holding in *Auer v. Robbins*, 519 U.S. 452 (1997), that he himself authored); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620-21 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* is . . . a dangerous permission slip for the arrogation of power" (citing *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011) (Scalia, J., concurring); Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96

Colum. L. Rev. 612 (1996)); *see also Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment) ("these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations"); *id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine [*Auer*'s predecessor] may be incorrect. . . . I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument"); *Decker*, 133 S.Ct. at 1338 (Roberts, C.J., joined by Alito, J., concurring) ("It may be appropriate to reconsider that principle in an appropriate case").

The non-delegation doctrine itself—which has not resulted in the invalidation of an Act of Congress in over 80 years—has also been getting renewed attention of late. *See, e.g., Reynolds v. United States*, 565 U.S. 432, 450 (2012) (Scalia, J., joined by Ginsburg, J., dissenting) (asserting that the majority's interpretation of the Sex Offender Registration and Notification Act, 120 Stat. 590, 42 U.S.C. § 16901 et seq., as giving the Attorney General the power "to decide—with no statutory authority whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals . . . sail[ed] close to the wind with regard to the principle that legislative powers are nondelegable."); *Perez*, 135 S. Ct. at 1219 n.4 (Thomas, J., concurring in the judgment ("It is difficult to see what authority the President has 'to impose legally binding obligations or prohibitions on regulated parties'" by the adoption of interpretive rules. "That definition suggests something much closer to the legislative power, which our Constitution does not permit the Executive to exercise in this manner."); *see*

also United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) (Gorsuch, J., raising non-delegation concerns about federal criminal statute that gave the Attorney General unfettered discretion to decide whether to apply its sex offender registration requirements to already-convicted sex offenders).

This case involves the related doctrine of *Chevron* deference, the separation of powers problems with which have also been highlighted recently by several members of this Court. In *Michigan v. EPA*, for example, Justice Thomas expressed concern that the EPA's "request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes," citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as the source of the problem. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). In *Perez*, the late Justice Scalia noted that the Court's various deference doctrines, including *Chevron* deference, were developed "[h]eedless of the original design of the" Administrative Procedures Act. "Never mentioning . . . [the] directive [in Section 706 of the APA, 5 U.S.C. § 706] that the reviewing court . . . interpret . . . statutory provisions," he added, "we have held that agencies may authoritatively resolve ambiguities in statutes." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in judgment) (citations omitted). And while still on the U.S. Court of Appeals for the Tenth Circuit, Justice Gorsuch described *Chevron* and its corollary, *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 967 (2005), as "an elephant in the room," noting that the holdings in those cases "permit executive bureaucracies to swallow huge amounts of core judicial and legislative

power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., separately concurring from his own majority opinion).

The Fifth Circuit decision below explicitly relied on *Chevron* deference to uphold a broad, unprecedented expansion of the U.S. Fish and Wildlife Service's power to designate as endangered species "critical habitat" private land that is admittedly not currently inhabited by the species at issue, or even capable of being inhabited by the species at issue without significant alterations to the property that the government cannot force the private owners to make. As the criticisms of the deference doctrines set out above indicate, the deference given to the administrative determination by the Fifth Circuit undermines separation of powers principles in two ways. First, it confers legislative powers on an executive agency, in violation of Article I's requirement that "All legislative powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1. Second, it "wrests from Courts the ultimate interpretative authority to 'say what the law is . . . and hands it over to the Executive,'" in violation of Article III's vesting of the judicial power in this "supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Michigan v. E.P.A.*, 135 S. Ct. at 2712 (Thomas, J., ,concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); U.S. CONST. art. III, § 1.

Those violations of core separation of powers principles are alone worthy of this Court's consideration. That this case presents an opportunity for this Court to take up the invitation recently made by several members of the Court to reconsider the deference doctrines themselves makes the petition for certiorari even more compelling.

II. The Fifth Circuit Did Not Even Apply *Chevron* Deference Correctly, Exacerbating the Separation of Powers Problem.

Repeating a line from the district court's opinion, the Fifth Circuit panel noted that "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." App. A-16 (quoting *Markle Interests LLC v. U.S. Fish & Wildlife Serv.*, 40 F.Supp.3d 744, 760 (E.D. La. 2014)). Building on that holding by the district court, the Fifth Circuit panel held that "when the Service promulgates, in a formal rule, a determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. App. A-16 (citing *Markle Interests*, 40 F.Supp.3d at 760 (in turn citing, *inter alia*, *Chevron*, 467 U.S. at 843 n.9 (1984))).

That is not a correct application of *Chevron*, for at least two reasons. First, the word "essential" is not ambiguous even without a specific statutory definition, particularly when read in context of the entire statutory scheme, so the court should have decided this case at *Chevron* step one without even reaching the *Chevron* step-two question whether the Service's "interpretation" was a reasonable one. As Judge

Jones persuasively noted in her opinion dissenting from the denial of the request for rehearing en banc, the power given to the Service to designate "critical habitat" extends only to "habitat," and then only to habitat that is "essential" to the preservation of the species. It unambiguously does not extend to land that is uninhabitable by the species at issue. App. C-11 to C-15. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

Many of the separation of powers concerns implicated by *Chevron* could be minimized if step one of *Chevron* was more robust, and this case presents a good opportunity to address that part of the problem.

Second, the panel below confused *application* of the law as written—a common executive function subject to non-deferential judicial review of whether the law had been interpreted correctly—with *resolving an ambiguity* in the law that would trigger *Chevron* step-two deference. Making a "determination" that some set of facts meets unambiguous statutory criteria is not an interpretive issue to which *Chevron* step two applies. The court's decision to the contrary only exacerbates the Article I non-delegation and Article III judicial role problems already inherent in *Chevron*; the opportunity to reign in at least that erroneous application of *Chevron* counsels for granting the petition here.

III. Deference to an Unelected Agency under *Chevron* Step Two Is Even More Problematic When the Statute Itself Is Already Constitutionally Suspect.

The application of the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. § 1531 *et seq.* to *non-commercial, wholly intrastate* species such as the Mississippi Gopher Frog at issue here, pursuant to Congress's power to regulate "commerce" "among the states," is itself constitutionally suspect. Allowing even further extension of the law's reach, through *Chevron* step-two deference to unelected bureaucrats, is therefore simply untenable.

In the wake of this Court's landmark decision in *United States v. Lopez*, 514 U.S. 549 (1995), reaffirming the foundational principle that the national government has only limited, enumerated powers, the lower courts were faced with Commerce Clause challenges to a number of federal statutes and regulations aimed at conduct that had nothing to do with interstate commerce. *See, e.g.*, Glen H. Reynolds & Brannon P. Denning, Lower Court Readings of *Lopez*, Or What If The Supreme Court Held A Constitutional Revolution And Nobody Came?, 2000 Wisc. L. Rev. 369 (2000) (citing cases). Among them were several cases in which the appellate courts, over vigorous, well-reasoned dissents, upheld the extension of the Endangered Species Act to wholly intrastate, non-commercial species against Commerce Clause challenges. *See, e.g., Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1158 (D.C. Cir. 2003) (Sentelle, J., dissenting from denial of rehearing en banc) ("The court's opinion in this case continues a divergence

from contemporary Supreme Court Commerce Clause jurisprudence"); *id.* at 1160 (Roberts, J., dissenting from denial of rehearing en banc) (noting that the panel decision's approach "seems inconsistent with the Supreme Court's holdings in [*Lopez*], and *United States v. Morrison*, 529 U.S. 598 (2000)); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286 (5th Cir. 2004) (Jones, J.,, joined by Jolly, Smith, DeMoss, Clement, and Pickering, JJ., dissenting from denial of rehearing en banc); *National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041 (D.C. Cir. 1997); *id.* at 1060 (Sentelle, J., dissenting).

Although this Court declined to take up the issue at the time, *see Rancho Viejo, LLC v. Norton*, 540 U.S. 1218 (2004) (denying petition for certiorari); *GDF Realty Investments, Ltd. v. Norton*, 545 U.S. 1114 (2005) (denying petition for certiorari); *National Ass'n of Home Builders v. Babbitt*, 524 U.S. 937 (1998) (denying petition for certiorari), this Court subsequently reaffirmed that the Commerce Clause has limits on grounds somewhat similar to those advanced by the dissenting circuit judges in each case. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547-62 (2012) (opinion of Roberts, C.J., holding that the individual mandate in the Affordable Care Act was not a valid exercise of Congress's Commerce Clause power); *id.* at 649-57 (Scalia, Kennedy, Thomas, Alito, Jj., joint dissent) (agreeing that the individual mandate exceeded Congress's power under the Commerce Clause). Whether the Endangered Species Act itself can be extended to wholly intrastate, non-commercial species therefore remains an open question in this Court and is still being addressed in the lower courts. *See, e.g., People for Ethical Treatment of Prop. Owners v. U.S.*

Fish & Wildlife Serv., 57 F. Supp. 3d 1337, 1346 (D. Utah 2014) (holding such an extension to be unconstitutional), *rev'd and remanded sub nom. People for Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017) (upholding the extension).

In this case, the Service itself, apparently emboldened by deference doctrines, extended the Endangered Species Act's reach even further. Under its interpretation, to which the panel gave deference, the Act reaches not just to wholly intrastate, non-commercial species, their occupied habitat, and their unoccupied habitat, but even to lands that are presently *uninhabitable* by the species. Troubling enough were Congress itself to have pressed the limits of Commerce Clause authority in such a fashion, it is simply intolerable in a system of limited, representative government for an unelected bureaucracy to expand its own power in such a fashion. The Commerce Clause problem, exacerbated when conjoined with the *Chevron* deference problem, is in particular need of this Court's review.

CONCLUSION

Several members of this Court have already acknowledged the significant separation of powers problems that result from the increasingly broad reliance on deference doctrines by the unelected administrative bureaucracy. Those problems are exacerbated when the underlying statute is itself constitutionally suspect. The petition for writ of certiorari should be granted so that this Court can restore the separation of powers principles that lie at the core of our constitutional system of government.

August 2017 Respectfully submitted,

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RECORD AND BRIEFS

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Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

[1] Pursuant to Rule 37.2(a), *amicus* provided timely notice of its intention to file this brief to counsel for all parties. Petitioners' counsel of record consented to the filing of this brief by filing blanket con-

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community. Many of the Chamber's members are landowners whose private property may be saddled with additional and unlawful regulatory burdens under the Endangered Species Act ("ESA") if the "critical habitat" designation authority asserted by the United States Fish and Wildlife Service ("Service") in this case is allowed to stand. And all of the Chamber's members have an interest in reaffirming courts' duty under *Chevron*[2] to engage in independent statutory interpretation, thus ensuring administrative agencies do not impose regulatory burdens that exceed statutory bounds.

SUMMARY OF ARGUMENT

The opinion below is emblematic of judicial decisions that disregard this Court's repeated insistence that *Chevron* requires courts to take seriously the statutory limits on agencies' authority and apply them rigorously in

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sents with the Clerk. Respondents' counsel of record consented to the filing of this brief. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

[2] See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (requiring judicial deference to certain executive agency statutory interpretations).

all cases. For deference under *Chevron* to be consistent with the legislative power to make law, the judicial duty to "say what the law is,"[3] and the executive obligation to faithfully execute it, the courts must exhaust the traditional tools of statutory construction to assure that the text of the statute written by Congress does not answer the question presented. Applying *Chevron* deference without first undertaking this intensive investigation violates fundamental principles of separation of powers, regardless of whether the agency offers a reasonable interpretation of the statute.

The importance of this case for the Nation's economy, landowners, and Chamber members cannot be overstated. The claim to sweeping agency power uncritically accepted by the court of appeals allows the Service to burden private property across the country with costly ESA Section 7[4] regulation virtually at will. Even worse, the lower court's fundamental misapplication of *Chevron* in this case reinforces a disturbing trend among lower courts to take a "hands off" approach to *Chevron* analysis, turning judicial review of agency action into little more than a rubberstamp of executive claims to statutory authority.

ARGUMENT

I. CERTIORARI IS WARRANTED TO REMIND FEDERAL COURTS TO CONDUCT A RIGOROUS TEXTUAL ANALYSIS UNDER *CHEVRON*

This dispute turns on the meaning of the term "critical habitat" in 16 U.S.C. § 1533(a)(3)(A)(i). In particular, the ESA provides that the Service "to the maximum extent prudent and determinable *** shall *** designate

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[3] See *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[4] See 16 U.S.C. § 1536(a)(2).

any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i).

Without first identifying any ambiguity in the operative statutory term, the court of appeals deferred under *Chevron* to the Service's interpretation, which stretches "critical habitat" to include private land that is not "habitat" at all, much less *critical* habitat. This resulted in upholding the Service's designation as "critical habitat" land that all parties agreed the endangered species cannot possibly inhabit. See Pet. App. 138a[5] (Jones, J., dissenting from denial of rehearing en banc) ("The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute."). In doing so, the Fifth Circuit ignored this Court's repeated insistence that *Chevron* deference is appropriate *only* when the court has determined—after exhausting the traditional tools of statutory construction—that the text of the statute does not resolve the question at issue. This Court should grant certiorari to reinforce that *Chevron* demands serious textual analysis from courts *before* any deference is shown to an agency's statutory interpretation.

A. *Chevron* demands careful analysis of the statutory text before deference is given

When reviewing agency interpretations of allegedly ambiguous statutory provisions, this Court often ends the *Chevron* analysis at the outset. Indeed, in recent Terms, this Court has repeatedly rejected requests for deference to an administrative interpretation because the text of the statute resolves the question at issue. See, *e.g.*, *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity

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[5] References to the "Pet. App." are to the Appendix to the Petition for Certiorari in *Weyerhaeuser Company* v. *United States Fish and Wildlife Service*, No. 17-71.

or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation."); *Coventry Health Care* v. *Nevils*, 137 S. Ct. 1190, 1198 n.3 (2017) ("Because the statute alone resolves this dispute, we need not consider whether *Chevron* deference attaches to OPM's 2015 rule."); *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1979 (2016) ("Even assuming, *arguendo*, that the preamble to the agency's rulemaking could be owed *Chevron* deference, we do not defer to the agency when the statute is unambiguous."); *FERC* v. *Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773 n.5 (2016) ("Because we think FERC's authority clear, we need not address the Government's alternative contention that FERC's interpretation of the statute is entitled to deference under *Chevron*."); *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1989 (2015) ("Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron*.").[6]

These cases reflect the axiom that "an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). If by "[e]mploying traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), the court determines that Congress has spoken clearly on the disputed question, then "that is the end of the matter," *Chevron*, 467 U.S. at 842. The agency is due no deference, for Congress has left no gap for the agency to fill. *Id.* at 842-844. Only "if the statute is silent or ambiguous with respect to the specific issue," does the Court

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[6] See also *Hawkins* v. *Cmnty. Bank of Raymore*, 761 F.3d 937, 941-942 (8th Cir. 2014) (rejecting agency interpretation as violative of statutory text and describing contrary opinion of the Sixth Circuit as "manufactur[ing] ambiguity" that did not exist), *aff'd by an equally divided court*, 136 S. Ct. 1072 (2016).

move on to ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

In upholding the Service's designation of Unit 1 as "unoccupied critical habitat" based on deference to the Service, the court of appeals skated past the textual analysis required by *Chevron*. Without identifying any ambiguity in the term "critical habitat," the Fifth Circuit deferred to the Service's sweeping and unprecedented interpretation of that term to include *non*-habitat. See Pet. App. 23a. The lower court's approval of an agency's statutory interpretation that defies both common sense and ordinary English usage is emblematic of recent lower-court decisions that ignore statutory text in contravention of the *Chevron* framework.

Robust enforcement of *Chevron* safeguards the separation of powers by ensuring that courts—not agencies—say what the law is. "[B]efore a court may grant [*Chevron*] deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting). The judicial duty—and the Administrative Procedure Act's charge that courts resolve "all relevant questions of law," 5 U.S.C. § 706—demand that courts exhaust the traditional tools of construction in every case where statutory interpretation is required. See *ibid.* At the very least, that duty requires careful investigation of the ordinary meaning of the words of the statute and rigorous analysis of the statute as a whole, not a single provision viewed in isolation. See *Carcieri* v. *Salazar*, 555 U.S. 379, 387-389 (2009) (reversing lower court's application of deference that failed to analyze "the ordinary meaning" of the text and "the natural reading of the [provision in question] within the context of the [statute]"). Had the court of appeals undertaken this essen-

tial analysis, the statute's text would have resolved the issue—as it has in so many of this Court's recent decisions—without resorting to *Chevron* deference.

B. Properly applying *Chevron* would have required rejecting the Service's interpretation

As Judge Jones's dissent from denial of rehearing en banc recognized, "the panel *** neglected" "to undertake holistic statutory interpretation." Pet. App. 131a-132a. Instead, its analysis focused exclusively on the statute's definitional provision. Because that provision—viewed in a vacuum—does not "appear to require that a species actually be able to inhabit its 'unoccupied critical habitat,'" the court of appeals concluded that the Act does not contain a habitability requirement. *Id.* at 131a. As Judge Jones explained, however, that conclusion is incorrect. *Id.* at 131a-135a.

The ESA states that the Service

> shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat *** and *** may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)-(ii). The meaning of this provision dictates that whatever is "critical habitat" must first be "any habitat of such species." The fact that the separate statutory definition of "critical habitat" includes both areas occupied by the species and areas not occupied by the species does not alter the fact that all such areas must be within the "habitat of such species"—*i.e.*, they must at least be capable of habitation by that species. The majority below did not even confront this ordinary-meaning roadblock, which stems from the very provision that empowers the Service to designate "critical

habitat" in the first place. It instead peremptorily reasoned that Congress had delegated broad authority to the Service and thus proceeded to apply *Chevron* deference. Pet. App. 15a-16a.

The lower court's interpretation also overlooks the ordinary meaning of the word "habitat" itself, which is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). See also The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"). Applying that ordinary meaning here, Unit 1 cannot be "habitat" because the dusky gopher frog does not—and indeed could not—"naturally live[] and grow[]" there. Pet. App. 23a-24a. And because Unit 1 cannot be habitat, it obviously cannot be *critical* habitat. Pet. App. 60a (Owen, J., dissenting) ("An area cannot be essential for use as habitat if it is uninhabitable.") (quotation marks omitted). This Court has rejected similar agency attempts to stretch statutory terms beyond their ordinary meaning. See, *e.g.*, *Freeman* v. *Quicken Loans*, 132 S. Ct. 2034, 2041-2042 (2012) (rejecting agency's bid for deference because "it is normal usage that, in the absence of contrary indication, governs our interpretation of texts").

The court of appeals' conclusion that the ESA contains no habitability requirement demonstrates the problems that arise when courts fail to apply the rigorous textual analysis required by *Chevron*. The court of appeals deferred to the Service's wrongheaded interpretation of the ESA without even pausing to ask whether any statutory ambiguity justified doing so. By breezing past that essential question, the court of appeals ignored the plain meaning of the word "habitat" and the essential limit Congress placed on the Service's discretion by using that term consistently throughout the statutory scheme. *Id.*

at 2044 (holding that there is no "warrant for expanding [a statutory provision] beyond the field to which it is unambiguously limited").

Instead of paying attention to the words Congress used to cabin the agency's discretion, the court of appeals mistakenly focused on the Service's expertise and its various scientific findings allegedly justifying its conclusion that Unit 1 is "essential to the conservation" of the frog. See Pet App. 162a (Jones, J.) ("The panel majority's nontextual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats."). But no amount of expertise can give an agency license to rewrite the terms of a statute. See *Chevron*, 467 U.S. at 842-843 & n.9 (If, by "employing traditional tools of statutory construction," the court determines that Congress' intent is clear, "that is the end of the matter."). No matter how much scientific analysis supported the Service's conclusion that Unit 1 is "essential to the conservation" of the frog, if Unit 1 is not "habitat," the Service lacks authority to designate it as "critical habitat."

Nor does the fact that *other* aspects of the ESA might be ambiguous change the analysis. The court of appeals apparently assumed that the phrase "essential to the conservation of the species" is ambiguous. Even if that is so, however, it is irrelevant because only *habitat* "essential to the conservation of the species" is eligible for designation, and Unit 1 cannot be habitat. The lower court's error—ignoring a textual limitation on agency power in the name of deference triggered by a secondary textual ambiguity—is symptomatic of a broader misapplication of *Chevron* that has been the subject of close attention by this Court in recent years. See, *e.g.*, *Kingdomware Techs., Inc.*, 136 S. Ct. at 1978 (rejecting lower court's reliance on statute's "prefatory clause" to "change the scope of the [statute's] operative clause"); *Cuomo* v.

Clearing House Ass'n, L.L.C., 557 U.S. 519, 525 (2009) ("[T]he presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of [the statute]").

This case provides a much-needed opportunity for the Court to further clarify the proper approach to statutory interpretation under the *Chevron* framework.

II. THE FIFTH CIRCUIT'S DECISION CONTRAVENES THIS COURT'S TEACHING THAT A VIGOROUS APPLICATION OF *CHEVRON*'S REASONABLENESS TEST IS AN ESSENTIAL PROTECTION AGAINST ULTRA VIRES AGENCY ACTION

The lower court's fundamental misapplication of *Chevron*'s reasonableness analysis further underscores the need for this Court to refine the second step of the *Chevron* rubric.

This Court has emphasized that "[e]ven under [*Chevron*']s deferential standard, *** 'agencies must operate within the bounds of reasonable interpretation.'" *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015). Thus, "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Id.* at 2708. Put another way, "where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *City of Arlington*, 133 S. Ct. at 1874.

The Court enforced this boundary in *AT&T Corp.* v. *Iowa Utilities Board*, holding an agency interpretation unreasonable because it was "not in accord with the ordinary and fair meaning" of the statutory terms. 525 U.S. 366, 389-390 (1999). Likewise, in *Department of Treasury* v. *FLRA*, this Court set aside the Department's interpretation as "not reasonable" because it was "flatly

contradicted by the language" and the "plain text" of the statute. 494 U.S. 922, 928 (1990).

As Judge Silberman recently put it: "Much of the recent expressed concern about *Chevron* ignores that *Chevron*'s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Global Tel*Link* v. *FCC*, No. 15-1461, 2017 WL 3380543, at *16 (D.C. Cir. Aug. 4, 2017) (Silberman, J., concurring). This case presents yet another example of "those kinds of agency tactics." *Ibid.*

Even assuming the relevant statutory terms are ambiguous, the interpretation embraced by the opinion below leads to absurd results—results that run afoul of *Chevron*'s litmus test of reasonable interpretation. As Judge Jones explained:

> Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C.* v. *U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.
>
> According to the panel majority, however, Unit 1 is "critical habitat" despite being unoccupied by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"),

> the panel majority make it easier to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land.

Pet. App. 143a.

That bizarre arrangement is at odds with uniform precedent interpreting the ESA, the statute's purpose, and its legislative history, all of which demonstrate that an unoccupied critical habitat designation was "intended to be *different* from and *more demanding* than an occupied critical habitat designation." *Id.* at 149a; see *id.* at 145a-150a. But because the court of appeals treated *Chevron* as a mere speed bump, it ignored all of the relevant interpretive evidence and accepted an interpretation that makes it easier to designate as critical habitat land on which the species cannot survive (like Unit 1) than land which is occupied by the species. That approach to *Chevron* ignores this Court's repeated holdings that the framework should be applied rigorously to discipline unreasonable agency interpretations—even those eligible for deference—to prevent blatant executive overreach. Pet. App. 49a (Owen, J.) ("The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government.").

Judge Owen's dissent further underscores the impermissibility of the Service's (and the panel majority's) interpretation. As she explained, that interpretation "depends entirely on adding words to the Act that are not there." Pet. App. 63a. Specifically, the "linchpin to the majority's holding" is that the Service must have "unfettered discretion to designate land as 'critical habitat' so long as *** at least one physical or biological feature[ ]

*** essential to the conservation of the species' [is] present" on the land. *Id.* at 63a-64a (quotation marks omitted). But by permitting "the Service to designate an area as 'critical habitat' if it has '*a critical feature*,'" the opinion below allowed the Service to "re-write[ ] the Endangered Species Act." *Id.* at 65a (emphasis in original).

This Court has consistently rejected agency attempts to "rewrit[e] statutory thresholds [as] impermissible." *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2445 (2014); *id.* at 2446 ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."). By "recogniz[ing] the authority claimed by [the Service]," the decision below "deal[t] a severe blow to the Constitution's separation of powers." *Id.* at 2446.

The Service's interpretation exceeds the bounds of permissible interpretation and thus fails under *Chevron*. Instead of uncritically deferring to it, the court of appeals should have been "alarmed that [the Service] felt sufficiently emboldened by [this Court's *Chevron*] precedents to make the bid for deference that it did here." *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring). Certiorari is warranted to address the emasculation of *Chevron* that has become all too common among the lower courts. See *Global Tel*Link*, 2017 WL 3380543, at *16 (Silberman, J., concurring).

III. The Decision Below Will Have Far-Reaching Implications For Landowners Across The Country

Petitioners present recurring issues with serious national ramifications. This case's importance extends beyond the core doctrines of administrative law discussed above to practical issues of ESA enforcement that affect myriad landowners across the Nation.

Resolving the Service's proper role with respect to "critical habitat" designations is vital. "Designation of

private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to result in the destruction or adverse modification of critical habitat." *Otay Mesa Prop., L.P.* v. *U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quotation marks omitted). In this case alone, the agency's sweeping and unprecedented interpretation allowed it to impose $34 million in costs on the landowner petitioners merely because the Service found a single feature essential to the dusky gopher frog's survival on their land. Pet. App. 158a-159a. In the view of the Chamber and its many landowner members, petitioner Weyerhaeuser is correct to warn that the Service's "single essential feature" rule will likely impose billions of dollars in costs on landowners across the country. Weyerhaeuser Pet. 4. As Judge Owen's dissent explained, the decision below threatens to subject large swaths of the United States to intensive federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Pet App. 49a. Even worse, under the lower court's holding, the Service's designations are largely immune from judicial review. *Id.* at 31a-34a (majority opinion); Weyerhaeuser Pet. 31-33.

As Judge Jones explained, if the opinion below evades further review, the Service will be "encourage[d]" to pursue "aggressive, tenuously based interference with property rights." Pet. App. 162a. Because the court of appeals—and the Service—relied on "non-textual interpre-

tations of the ESA" in violation of *Chevron*, this Court should grant certiorari and enforce "Congress's efforts to prescribe limits on the designation of endangered species' habitats." *Ibid.*

CONCLUSION

The Chamber respectfully requests that the petitions for writs of certiorari be granted.

Respectfully submitted.

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August 2017

RECORD AND BRIEFS

No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTEREST OF THE *AMICUS CURIAE*[1]

The Energy and Wildlife Action Coalition ("EWAC") respectfully submits this brief as amicus curiae in support of the petitioner Weyerhaeuser Company.[2] EWAC is an unincorporated association headquartered in Washington, D.C. comprised of electric utilities, electric transmission and distribution providers, renewable energy companies, and related trade associations. EWAC members operate throughout the United States.

EWAC's fundamental goal is to evaluate, develop, and promote reasonable environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

The Fifth Circuit's ruling will have a significant impact on EWAC members. EWAC's members develop, construct, maintain, own, and operate electric generation, transmission, and distribution facilities that are

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3(a), written consent to the filing of this brief has been obtained from counsel for Petitioner and Respondents. Petitioner's consent is on file, as is consent of Respondent Markle Interests LLC, et al. Document confirming consent of Respondents U.S. Fish and Wildlife Service, et al. and Center for Biological Diversity, et al., have been submitted to the Clerk's office.

[2] EWAC also supports the arguments advanced by the companion petition filed by Markle Interests, LLC, and others, No. 17-74.

located or proposed to be built on private and public lands that are not habitable by threatened or endangered species ("listed species"), and yet these areas could be designated as critical habitat for such species under the criteria upheld by the divided panel of the Fifth Circuit.

Endangered Species Act ("ESA") consultation requirements may be triggered under ESA section 7(a)(2) if a proposed facility is located on or crosses federal lands or if it requires a federal permit or approval. *See* 16 U.S.C. § 1536(a)(2). Many EWAC members have existing facilities on federal lands and will continue to construct across federal lands to meet the electricity needs of their customers. Further, many EWAC members' facilities on public or private lands require federal approvals such as Clean Water Act ("CWA") section 404 permits and Federal Energy Regulatory Commission ("FERC") licenses and some receive federally backed financing. If critical habitat is present in any of these scenarios, ESA section 7(a)(2) triggers additional review. This additional review can result in significant increases in the time and cost for the affected project, which ultimately results in increased costs to electricity consumers. Other EWAC members obtain private financing to construct their facilities. The existence of critical habitat or the threat of a potential critical habitat designation within a facility's footprint also adversely impacts private financing, as lenders and investors react to the increased costs and risks posed by critical habitat.

SUMMARY OF ARGUMENT

The Fifth Circuit has blessed a standard for designating land as "critical habitat" that is currently uninhabitable by a listed species and has no prospect of ever becoming habitable by that species, thereby

imposing an unworkable and unreasonable regulatory burden on the development and continuing operation of electrical infrastructure throughout the country.

The Fifth Circuit wrongly deferred to the U.S. Fish and Wildlife Service's ("Service") designation of an area as "critical habitat" for the endangered dusky gopher frog (*Rana sevosa*) even though that area cannot sustain that species, now or in the foreseeable future, and has no connection to any area that is actually habitable by that species.

There are real consequences for the nation's electricity generation, transmission, and distribution infrastructure from designating areas that cannot be inhabited by a listed species as "critical habitat" and from extending the protections – and regulatory requirements – of the ESA to those areas. Through this *amicus* brief, EWAC offers the Court a window into how the Fifth Circuit's decision could disrupt the development and ongoing operation of its members' facilities.

EWAC also expands upon the Petition's discussion of some of the legal errors made by the Fifth Circuit majority in its opinion. The Fifth Circuit incorrectly limited its analysis to the ESA's definition of "critical habitat" and failed to consider how the term is used in the statute's operative provisions or in the additional criteria for critical habitat provided by the ESA provision that authorizes the designation of "critical habitat" by regulation.

The concept that "critical habitat" is, first and foremost, habitat for a listed species is embedded in the ESA. When the Service lists a species under the ESA the statute directs the Service, "to the maximum extent prudent and determinable," to designate by regulation

"*any habitat of such species* which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A) (emphasis added). The ESA also requires federal agencies to consult with the Service before undertaking or authorizing an action that is likely to destroy or adversely modify "habitat . . . which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2).

The Fifth Circuit's erroneous approach to interpreting the ESA resulted in it giving improper deference to a Service interpretation that conflicts with the plain language of the statute's operative provisions. It also brought the Fifth Circuit into conflict with prior decisions of the Ninth Circuit, which recognized that the criteria for designating unoccupied critical habitat are more stringent, not less stringent, than those applicable to occupied critical habitat. *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010).

REASONS FOR GRANTING PETITION

I. Designating Areas That Are Not Habitable By A Listed Species As "Critical Habitat" Harms The Development And Operation Of Energy Infrastructure.

Constructing electricicity generation, transmission and distribution facilities requires thousands of acres of land and years of planning and development. Once this electrical infrastructure is constructed, ongoing operations include maintenance, emergency repairs, and improvements. The designation of critical habitat in areas uninhabitable by listed species could have severe economic consequences for EWAC members' existing and future energy infrastructure. Ultimately, this cost is borne by the consumers and taxpayers.

EWAC members can and often do design and plan facilities to avoid or minimize impacts to areas known to support listed species. For example, a transmission line or wind or solar energy facility may be sited, when feasible, to avoid wooded areas that are suitable for listed bat species or riparian habitat that supports listed salamanders. The Fifth Circuit's decision allows the Service to designate as critical habitat former woodlands that were logged long ago and converted to other uses on the premise that the land could one day revert back to forest and grow into suitable bat habitat. The Service also could designate as critical habitat land near streams that has been converted from native vegetation to agriculture but could, in theory, one day be restored to support listed salamanders. Electrical infrastructure that crosses these sites and that had been sited with the specific objective of avoiding sensitive habitat suddenly and unexpectedly overlaps critical habitat. In both cases and other similar ones that could arise, it would be impossible for EWAC members to factor such possibilities into their siting and routing decisions and extremely difficult to budget for these uncertainties.

The energy projects undertaken by EWAC's members take years to design and construct. Electricity generation locations and transmission routes are carefully investigated, weighing a host of factors that routinely include avoiding and minimizing impacts to sensitive habitats and other natural resources. Once decisions are made about routes and facility locations, it normally takes several years to acquire or access property, obtain permits, and construct the facilities. As development proceeds, it becomes increasingly expensive and challenging to change the design, reroute a segment, or relocate facilities.

But all of the care an entity takes to avoid sensitive habitats would be for naught if the Service can interject, at any point in the development timeline or the operating life of a project, a determination that lands that do not contain the physical or biological features necessary to sustain an ESA-listed species nevertheless are "unoccupied critical habitat" and subject to the full protections afforded by the ESA. A project developer or facility operator simply cannot anticipate or develop contingencies for this entirely unpredictable risk that land which is not habitat can be declared by the Service to be "critical habitat," with attendant regulatory consequences.

Oftentimes, even when private entities are constructing electrical infrastructure on private land, construction requires some level of federal permitting and may involve federal financial support. If a federal permit is required or federal funding is provided, the federal agency is obligated by ESA section 7(a)(2) to consider whether the activity it is authorizing will destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). One of the most common federal authorizations that EWAC members must secure is authorization under CWA section 404 for placing fill in waters of the United States. 33 U.S.C. § 1344. In many parts of the country, it is virtually impossible to site electrical infrastructure of any significant length and avoid impacting wetlands. Thus, many projects require section 404 permits for wetlands impacts at multiple sites along their routes. The U.S. Army Corps of Engineers' (the "Corps") issuance of a section 404 permit is subject to the ESA's consultation requirement, including consideration of potential impacts on critical habitat. *See* 16 U.S.C. § 1536(a)(2).

The Corps has adopted a streamlined Nationwide Permit ("NWP") program under CWA section 404 that is "designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). EWAC members regularly rely on the NWP program for expedited authorization to construct, operate, and maintain their facilities. For example, NWP 12 authorizes utility line work with limited impacts on wetlands and waterbodies:

> Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017).

For an activity to be authorized under the NWP, the activity must adhere to a set of general conditions. General Condition 18 requires that non-federal permittees (such as EWAC members) notify the Corps if any designated "critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat," and the activity cannot proceed until the Corps has completed its obligations under ESA section 7(a)(2). 33 C.F.R. § 330.4(f)(2). If critical habitat might be affected or is within the vicinity of its NWP activity, a project proponent is thrown into a delayed permitting pathway, requiring pre-construction notification and potential consultation between the Corps and the Service. *Id.* The Fifth Circuit's decision would create significant uncertainty in this process. If a designation occurred

during project development, despite a project proponent's best efforts to avoid sensitive habitats and thereby reduce potential wildlife impacts and permitting burden, it would impose these additional costs and delays even though the "critical habitat" is not only unoccupied, but uninhabitable by the species.

If the Service requires formal consultation, the Service's Biological Opinion likely will require the implementation of measures that add further costs and delays, defeating the NWP objective of regulating "with little, if any, delay or paperwork." 33 C.F.R. § 330.1(b). Perversely, the fact that the land currently is uninhabitable is likely to result in even greater costs for the proponent, particularly if the Service seeks to condition what should otherwise be a simple permit on some effort to convert the land to a condition that is useable by the species. This outcome is unreasonable, will increase costs and cause delay, and could prevent projects from being built or existing infrastructure from receiving necessary improvements, disrupting access to reliable and affordable electric power, all while providing little or no benefit for listed species.

The time, complexity, and cost of federal permitting increase where critical habitat is present. For example, one EWAC member was required to obtain a CWA permit for construction activities, which in turn triggered ESA consultation as the project occurred within areas designated as Canada lynx critical habitat. The Service could not definitively identify any effect the project would have on the critical habitat, and yet the company was required to conduct pre-construction, construction, and post-construction monitoring of lynx in the area. Not only did the existence of critical habitat add significant length to the permitting process, but the potential effects to the critical habitat

also triggered additional costs even where the Service could not definitively identify effects to the species.

This scenario would be even more complicated if the "critical habitat" in question were uninhabitable by the listed species. If the potential effect of a project on useable Canada lynx habitat is unclear, it would be that much more difficult to respond to Service concerns about potential effects to habitat that is not habitable.

EWAC members have thousands of miles of existing electric transmission and distribution facilities that occur on federal lands, and they will continue to develop and improve these facilities in the future in order to ensure delivery of safe and reliable electric power to America. The siting and construction of new infrastructure, as well as the operation and maintenance of existing infrastructure, on federal lands are subject to rights-of-way ("ROW") obtained from the relevant federal agencies (Bureau of Land Management, U.S. Forest Service, etc.). Grants of ROW accesses are discretionary federal actions, and therefore trigger the action agency's obligation to consult with the Service under the ESA. 16 U.S.C. § 1536(a)(2). The action agency must then evaluate the effects of granting the ROW on listed species and critical habitat. 50 C.F.R. § 402.02(c).

If the ROW has the potential to affect listed species or critical habitat, the approval of the ROW is typically conditioned on a suite of measures, to be undertaken by the entities, that are designed to avoid, minimize, and mitigate for these effects. EWAC members that have an existing or future ROW within federal lands where unoccupied, uninhabitable areas are designated as critical habitat may be obligated to provide conservation measures as a condition of the ROW approval.

These conservation measures may impose restrictions that prevent timely access to electrical infrastructure, which is especially problematic when emergency repairs are needed.

Moreover, because electric transmission and distribution systems extend over great distances, during project design and ESA consultation the effects to critical habitat often are coarsely estimated based on critical habitat maps. In those instances, and where critical habitat is designated over uninhabitable areas, the magnitude of the effects to habitat that actually could be utilized by a species (and of the corresponding conservation measures required) are grossly overestimated during the ESA consultation process. Further, the opportunities to select routes that avoid impacts to habitat that listed species may actually use are obscured and lost.

Many EWAC members also have existing federal authorizations for their facilities (such as FERC licenses) that require consultation in accordance with ESA section 7(a)(2). These authorizations include provisions requiring that consultation be re-initiated should new critical habitat be designated that may be affected by the authorized action. The re-initiated consultation could result in the licensee being required to implement additional conservation measures to maintain a valid license. This is an unreasonable and costly outcome, particularly where the critical habitat triggering the consultation is neither habitable by a listed species nor likely to become habitable.

Finally, even where an EWAC member's facility is entirely private (and therefore does not trigger the obligations of ESA section 7(a)(2)), financing can be adversely impacted if critical habitat occurs within or adjacent to the facility's footprint. Financiers will

often impose more expensive terms to financing based on the existence of critical habitat because of the potential that a future federal authorization or permit could be needed, triggering ESA section 7 consultation, resulting in unanticipated costs. It becomes that much harder (indeed, nearly impossible) for all parties to evaluate future financial risk if the Service has the power to designate land occupied by a proposed project or existing facility as critical habitat even though the land lacks the physical or biological features needed to sustain the listed species. No preconstruction survey could identify or quantify this risk.

The Fifth Circuit's approval of the designation of "critical habitat" that is uninhabitable is such a profound departure from any reasonable and workable interpretation of the ESA that it warrants this Court's grant of certiorari and correction of that error.

II. Contrary To The Fifth Circuit's Ruling, The ESA Dictates That "Critical Habitat" Must Be Habitable.

The ESA defines occupied and unoccupied critical habitat separately. Occupied habitat must be occupied by the species at the time the species is listed as threatened or endangered. 16 U.S.C. § 1532(5)(A)(i). It is further differentiated by the presence of features that: (1) are "essential for the conservation of the species"; and (2) "may require special management considerations or protection." *Id.*

Unoccupied critical habitat is defined by the importance of the *area* to a listed species. It is limited to areas that are not occupied at the time of species listing but nevertheless are "essential for conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

Looking only to the second part of the statute's definition of critical habitat, the Fifth Circuit determined – wrongly – that the sole criterion the ESA provides for designating unoccupied critical habitat is found in the word "essential" in section 1532(5)(A)(ii). Pet. App. 15a, 21a. The Fifth Circuit then ruled that the ESA does not define "essential," that the word is ambiguous, and accordingly that the Service's determination that an unoccupied area is "essential" and so should be designated as critical habitat (without regard to whether the area is habitable) is entitled to *Chevron* deference. Pet. App. 15a–16a, 21a, citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

The Fifth Circuit should not have advanced past the first step in its *Chevron* analysis, as deference to the Service's interpretation of the ESA "is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (*quoting Chevron*, 467 U.S. at 843). The Fifth Circuit mistakenly ignored both the occurrence of the word "habitat" in the defined phrase itself and the ESA's operative provisions, which plainly state that critical habitat is, first and foremost, habitat for the listed species. *See* 16 U.S.C. §§ 1533(a)(3)(A)(i), 1536(a)(2).

In any event, the Fifth Circuit's *Chevron* step 2 analysis is equally flawed, as the Fifth Circuit erred by endorsing the Service's unreasonable exclusion of habitability from the criteria for critical habitat. "Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regulatory Grp. v. Envtl. Prot. Agency*, 573 U.S. ___, ___, 134 S.Ct. 2427, 2442 (2014) (*quoting*

City of Arlington, Tex. v. Fed. Commc'ns Comm'n, 569 U.S. 290, 133 S.Ct. 1863, 1868 (2013)).

A. The Fifth Circuit failed to consider the operative provisions of the ESA, which plainly state that critical habitat must be habitable.

The Fifth Circuit's majority stated its view of the central issue in this appeal categorically: "There is no habitability requirement in the text of the ESA." Pet. App. 23a. But in making that sweeping pronouncement, the Fifth Circuit was wrongly informed by having read the statute's critical habitat definition in isolation and having failed to account for how the term is used in the operative provisions of the ESA. *See* Pet. App. 15a–27a (majority opinion analyzes only section 1532(5)(A)(i)–(ii)).

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders*, 551 U.S. at 666 (internal quotation omitted). Failing to follow this basic tenet caused the Fifth Circuit to adopt a mistaken Service interpretation that is squarely inconsistent with the plain meaning of the criteria for critical habitat set out in other ESA provisions.

The Fifth Circuit began by ignoring the fact that the term "critical habitat" includes the word "habitat," carrying with it the implication that an area is capable of supporting a particular species, even if the species does not currently occupy the area. This meaning of the term, readily apparent on its face, is validated by the way the term "critical habitat" is used in the operative provisions of the ESA. "[R]easonable statutory interpretation must account for both 'the specific

context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S.Ct. at 2442 (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Section 4 of the ESA authorizes the Service to designate a subset of the habitat of a listed species as "critical habitat":

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable –
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*;

16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This provision only authorizes the Service to designate "habitat of such species" as critical habitat. It does not authorize critical habitat designations for areas that are not habitable.

The definition of critical habitat in ESA section 3 must be read in the context of the criteria that ESA section 4 also provides to the Service for designating critical habitat—including the requirement that critical habitat be "habitat of such species." 16 U.S.C. § 1533(a)(3)(A)(i); *see Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S.Ct. at 2442 (interpretation must account for "the broader context of the statute as a whole"). These ESA provisions should be interpreted in harmony; the definition in section 3 cannot nullify

the explicit requirement in section 4 that critical habitat be habitat for the listed species, yet that is the effect of the Fifth Circuit's ruling.

Congress also described critical habitat as a subset of a species' habitat in ESA section 7, one of the statute's central protections for listed species, directing all federal agencies to consider the potential damage to "habitat . . . which is determined . . . to be critical" that could stem from their actions and the actions they approve:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species *or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical*, ...

16 U.S.C. § 1536(a)(2) (emphasis added). The phrase "habitat of such species which is determined . . . to be critical" refers to critical habitat designated under ESA section 4. *See Bennett v. Spear*, 520 U.S. 154, 157–58 (1997). By using the formulation "habitat . . . which . . . is critical" to describe "critical habitat," section 7 could not be more explicit that its requirements apply to the "critical" subset of the habitat for a listed species.

The Fifth Circuit's holding that "[t]here is no habitability requirement in the text of the ESA," Pet. App. 23a, is flatly contradicted by the plain language of ESA

sections 4 and 7. Both are explicit that "critical habitat" must be habitat of the listed species.

B. The Fifth Circuit wrongly gave *Chevron* deference to a Service interpretation of unoccupied critical habitat that conflicts with the plain language of the ESA.

As discussed in the prior section, the Service's determination that unoccupied critical habitat need not be habitable by the listed species rests upon 16 U.S.C. § 1532(5)(A)(ii) read in isolation from the rest of the statute. The Service's interpretation of that provision conflicts with the plain language of the other ESA provisions that govern the actual designation of critical habitat and the protection of that habitat in federal agency decision-making, 16 U.S.C. §§ 1533(a)(3)(A)(i) and 1536(a)(2).

Deference to the Service's interpretation of the ESA "is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text." *Nat'l Ass'n of Home Builders*, 551 U.S. at 665 (*quoting Chevron*, 467 U.S. at 843). "In making the threshold determination under *Chevron*" as to whether congressional intent is clear or ambiguous in the language of a statute, "'a reviewing court should not confine itself to examining a particular statutory provision in isolation.'" *Id.* at 666 (*quoting Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).

The Fifth Circuit should have stopped after the first step in its *Chevron* analysis. Here, congressional intent is clear that critical habitat is a subset of the habitat of a listed species. 16 U.S.C. §§ 1533(a)(3)(A)(i), 1536(a)(2). The Fifth Circuit never considered those

provisions. If it had done so, it would not have erroneously claimed that "there is no habitability requirement in the text of the ESA." Pet. App. 23a.

"A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S.Ct. at 2442 (*quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)) (*ellipsis in original*).

The ambiguity the Fifth Circuit found in the ESA's definition of unoccupied critical habitat is removed by the remainder of the ESA's statutory scheme. It is a bedrock requirement of the statute, when read as a whole, that an area must provide habitat for a species if it is to be designated as occupied or unoccupied critical habitat. *See* 16 U.S.C. §§ 1533(a)(3)(A)(i), 1536(a)(2). The Fifth Circuit should not have given *Chevron* deference to the Service's determination otherwise, as Congress directly addressed that precise question in the ESA's operative provisions.

C. The Fifth Circuit wrongly gave *Chevron* deference to a Service interpretation that goes beyond reason.

The Fifth Circuit concluded that it was obligated to extend *Chevron* deference to the Service's determination that an area that is not and could not be occupied by the dusky gopher frog is, nevertheless, critical habitat. Pet. App. 15a, 21a–22a. It found that the phrase "essential for the conservation of the species," appearing in the definition of unoccupied critical habitat in 16 U.S.C. § 1532(5)(A)(ii), gave discretion to the

Service, noting that the ESA does not define "essential." Pet. App. 15a. It held that, by using this undefined term, Congress delegated authority to the Service to determine whether an unoccupied area is "essential" for a species and that when the Service promulgates such a determination through formal rulemaking it is entitled to *Chevron* deference. Pet. App. 15a.

As explained above, *Chevron* deference was unwarranted as to the central question here, since portions of the statute ignored by the Fifth Circuit plainly state congressional intent that critical habitat be habitable by a species. Contrary to the Fifth Circuit's holding, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." *Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S.Ct. at 2442 (*internal quotation omitted*).

However, even without the guidance provided by other portions of the ESA, the Fifth Circuit was wrong to give deference to the Service's interpretation. "Even under *Chevron's* deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Id.*, 134 S.Ct. at 2442. *Chevron* "directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Mich. v. Envtl. Prot. Agency*, 576 U.S. __, __, 135 S.Ct. 2699, 2707 (2015). But an agency's reading of a statute must still remain within the bounds of reasonable interpretation. *Id.*

Reading the ESA to allow an uninhabitable area to be designated as "critical habitat" strays far beyond the bounds of reasonable interpretation and cannot survive judicial scrutiny. *See id.* (EPA wrongly interpreted the word "appropriate" in the Clean Air Act

provision as allowing it to ignore costs of pollution controls).

There are limits to the meaning of "essential," and so to the Service's discretion. Here, the Service designated as "essential" an area that provides no conservation benefit to the dusky gopher frog and will not do so in the future. To deem an area "essential" to a species that has no connection to the species and no foreseeable ability to sustain the species goes beyond the bounds of reason. Even where *Chevron* deference does apply, it has limits, and those limits were exceeded here. *See id.*

III. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that requiring unoccupied habitat to be habitable "effectively conflates" the separate standard for unoccupied land with the standard for land occupied by a species, and that only occupied habitat must contain all of the relevant physical or biological features to support a species. Pet App. 23a. As a result, the Fifth Circuit imposed a significantly less stringent standard on the designation of unoccupied habitat, which here contained only one of three features necessary for survival of the dusky gopher frog, from the standard applicable to designation of occupied habitat. *Id.*

This holding put the Fifth Circuit in direct conflict with Ninth Circuit decisions recognizing that the criteria for unoccupied critical habitat are more stringent, not less stringent, from those applicable to occupied critical habitat. As was made clear in *Arizona Cattle Growers' Association v. Salazar*, the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas" as critical habitat. 606 F.3d at 1163.

At issue in *Arizona Cattle Growers* was whether the Service unlawfully designated areas containing no Mexican spotted owls as occupied critical habitat in order to "bypass[ ] the statutory requirements for designating unoccupied areas." *Id.* at 1162. Directly after reciting the ESA's dual definition of "critical habitat," the Ninth Circuit stated: "The statute thus differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Id.* at 1163.

The Ninth Circuit then went on to analyze at length the meaning of "occupied," the term that underpinned the factual question of "whether the [Service] treated unoccupied areas as occupied to avoid this more onerous process." *Id.* Such extended analysis would not have been necessary but for the practical regulatory import of the dual definitions of critical habitat and the Ninth Circuit's recognition that the standard for designation of unoccupied habitat is more onerous. *See id.* at 1163–67.

Later in 2010, the Ninth Circuit reiterated that the standard for unoccupied critical habitat "is a more demanding standard than that of occupied critical habitat." *Home Builders Ass'n of N. Cal.*, 616 F.3d at 990 (9th Cir. 2010). There, the plaintiffs claimed that the Service had conflated occupied and unoccupied habitat in certain designations of areas containing vernal pools as critical habitat for 15 species. *Id.* The Ninth Circuit reasoned that no requirement exists that each designated area be classified as occupied or unoccupied, and that:

> In any event, [the Service] ultimately concluded that "the areas designated by this final

> rule, including currently occupied and unoccupied areas, are essential for the conservation of the species." Essential for the conservation is the standard for unoccupied habitat and is a more demanding standard than that of occupied critical habitat. Thus, basing the designation on meeting the more demanding standard poses no problem.

Id. (internal citations omitted). The Ninth Circuit upheld the critical habitat designation because it met the higher standard for designation of unoccupied habitat regardless of whether some areas were in fact occupied. *Id.*

In contrast, the Fifth Circuit here interpreted "essential for the conservation of the species" as imposing a decidedly lower standard on the designation of unoccupied habitat. By granting such liberal deference to the USFWS interpretation, the Fifth Circuit effectively inverted the rigor associated with each type of critical habitat designation and (apparently unknowingly) rejected the Ninth Circuit's patently contrary interpretation of the plain language of the ESA. Further, the Fifth Circuit majority opinion failed to acknowledge or directly address the relevant portions of this contrary case law of the Ninth Circuit. This Court should grant certiorari to resolve this conflict between the circuits regarding one of the primary mechanisms for the Service's implementation of the ESA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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WEYERHAEUSER COMPANY,

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v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

Central to the notion of a limited government is the constitutional principle of enumerated powers: those powers not explicitly delegated to the federal government are reserved to the States and the people. These limited powers include Congress's power to

[1] Pursuant to Supreme Court Rule 37.2(a), all parties consent to the filing of this amicus curiae brief and received notice at least 10 days prior to the due date. Pursuant to Supreme Court Rule 37.6, the undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

make rules regulating interstate commerce, as conferred by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. Legislation that reaches beyond Congress's constitutional authority results in a federal government that is no longer limited and ethical, and further erodes individual liberty, the right to own and use property, and the free enterprise system. Accordingly, MSLF has been actively involved in litigation challenging Congress's power under the Commerce Clause. *E.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*") (amicus curiae).

MSLF has also been actively involved in the proper interpretation and application of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*. *E.g.*, *Shuler v. Babbitt*, 49 F. Supp. 2d 1165 (D. Mont. 1998) (successfully represented livestock operator charged with unlawfully taking a grizzly bear). More specifically, MSLF has sought to prevent the ESA from reaching activities on private land and purely intrastate species. *See, e.g.*, *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017) ("*PETPO*"); *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir. 2011).

If the panel majority's expansive interpretation of the U.S. Fish and Wildlife Service's ("FWS") authority under the ESA is allowed to stand, nothing will be beyond the reach of federal regulation, and the principles of federalism enunciated by this Court's distinction between "what is truly national and what is truly local"

in *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) will be a dead letter.

STATEMENT OF THE CASE

On June 12, 2012, the FWS designated 1,544 acres of private land in Louisiana, owned and controlled by Petitioners, as critical habitat for the dusky gopher frog, an endangered species found solely in Mississippi. *Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 827 F.3d 452, 459 (5th Cir. 2016); 77 Fed. Reg. 35,118 (June 12, 2012). This designation was made despite the land being unoccupied and uninhabitable by the dusky gopher frog, as the land only contained one of the three "primary constituent elements" (*i.e.*, biological or physical features) necessary for the frog's survival. 77 Fed. Reg at 35,131, 35,135. For the frog to survive on Petitioners' uninhabitable land ("Unit 1"), significant modifications would be required, including burning down the existing loblolly forest, which is currently used for timber harvest, and replanting a long leaf pine forest. *Id.* at 35,132, 35,135. The FWS admits that Petitioners are not inclined to take such action, and cannot be forced to do so. *Id.* at 35,123, 35,129. The designation of Unit 1, by the FWS's own estimation, will cost the Petitioners up to $34 million in lost revenue. *Id.* at 35,141. Despite this heavy financial burden and knowledge of Petitioners' unwillingness to cease timber development, burn down the existing forest, and replant a new forest; FWS refused to exclude Unit 1 from the designation of critical habitat in favor of the

unquantifiable biological benefits that may occur if Petitioners were to change their minds. *Id.*; *Markle Interests*, 827 F.3d at 466.

Petitioners challenged the critical habitat designation, arguing, *inter alia*, that the designation was not a constitutional application of Congress's authority under the Commerce Clause. *Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 40 F. Supp. 3d 744, 758 (E.D. La. 2014). After stating that the "Court is tempted to agree" that the FWS exceeded its constitutional authority by the "odd . . . agency action" of designating uninhabitable lands, the district court deferred to the agency action and therefore found itself "without power" to overturn it. *Id.* at 758-59.

On appeal, a divided panel of the Fifth Circuit affirmed, finding that the "regulated activity in question is the designation of Unit 1 as critical habitat," and therefore, all critical habitat designations may be aggregated to find a substantial effect on interstate commerce. *Markle Interests*, 827 F.3d at 476. Determining that the ability to designate critical habitat in general is essential to the ESA, which it found to be an "economic regulatory scheme[,]" the panel upheld the constitutionality of the designation of Unit 1. *Id.* at 476-79. Judge Owen dissented on the basis that, *inter alia*, land cannot statutorily be "essential" to the conservation of the species if it is uninhabitable by that species. *Id.* at 481, 483-85.

Petitioners filed a petition for rehearing en banc, which was denied by a sharply divided court. *Markle*

Interests, LLC v. U.S. Fish and Wildlife Serv., 848 F.3d 635 (5th Cir. 2017). Judge Jones, writing in dissent for the six-judge minority, explained that there are simply no "real limiting principles" in the panel majority's opinion: "[I]f critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then . . . the Service has free rein to regulate any land that contains any single feature essential to some species' conservation." *Id.* at 645, 649.

SUMMARY OF ARGUMENT

The absence of a limiting principle in the panel majority's opinion violates the Commerce Clause of the U.S. Constitution and necessitates this Court's review. According to the panel majority, the FWS may regulate any land that could, with enough time, money, and effort, be transformed into critical habitat. This interpretation would turn the FWS's already substantial power to protect threatened or endangered species and their habitats into a general police power akin to that reserved to the states. This Court has repeatedly held that, however broadly the Commerce Clause may be construed, it may not be read so as to eviscerate the distinction between what is truly national and what is truly local. There are outer boundaries to Congress's powers under the Commerce Clause, and, when an agency pushes the limits of those boundaries, its interpretation of the statute at issue is not accorded deference. The panel majority both failed to suggest a

convincing limiting principle to its holding and improperly deferred to the FWS's interpretation of its own power.

The panel majority compounded its flawed analysis by determining that the FWS's designation of Unit 1 fell within Congress's Commerce Clause power because, in the aggregate, critical habitat designations generally have a substantial effect on interstate commerce. By holding that the regulated activity to be aggregated is the regulation itself, the panel majority effectively insulated all species listings and critical habitat designations under the ESA from Commerce Clause challenges. Because the implications of shielding federal agency actions from judicial scrutiny under the Commerce Clause are far-reaching, this Court should grant certiorari.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AN AGENCY IS ENTITLED TO DEFERENCE WHEN ITS INTERPRETATION OF THE STATUTE PUSHES THE OUTER LIMITS OF THE COMMERCE CLAUSE AND VIOLATES PRINCIPLES OF FEDERALISM.

Our federal government is one of limited, enumerated powers; "the States and the people retain the remainder." *Bond v. United States*, 134 S. Ct. 2077, 2086

(2014). The States have "broad authority to enact legislation for the public good – what we have often called a 'police power.' The Federal Government, by contrast has no such authority and 'can exercise only the powers granted to it.'" *Id.* (quoting *Lopez*, 514 U.S. at 567, and *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405 (1819)). Congress has the enumerated power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause power is limited in scope and "is subject to outer limits." *Lopez*, 514 U.S. at 557. One such limitation inherent in the Commerce Clause is that federal regulation may not reach activity that is purely local, lest Congress's "authority under the Commerce Clause [be converted] to a general police power of the sort retained by the States." *Id.* at 567-68 (There must be "a distinction between what is truly national and what is truly local."). Although some of this Court's decisions "have taken long steps" down that road in "giving great deference to congressional action[,]" *id.*, this Court has maintained that the "Founders denied the National Government" a general police power. *United States v. Morrison*, 529 U.S. 598, 618 (2000).

In derogation of this essential limitation on federal power, the panel majority determined that, under the ESA, the FWS could regulate private land located miles away from a species and its existing or potential habitat. *Markle Interests*, 827 F.3d at 466-67. Unit 1 bears no relation to the species sought to be protected,

other than that it contains, at most, one element necessary for survival of the species – "ephemeral ponds." *Id.* Even worse, the panel majority reached this conclusion by deferring to the FWS's reading of the ESA – a reading that interprets the ESA's requirement that critical habitat be "essential for the conservation of the species" to include non-habitat. *Id.* at 467-68 (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)); 16 U.S.C. § 1532(5)(A)(ii). The panel majority's opinion is so deeply flawed that it crashes headlong into the outer limits of Commerce Clause authority, breezing by any federalism concerns in the process.

Since at least the time of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court has recognized that Congress's enumerated powers, granted by the Constitution, place discernable limitations on its power to legislate, and when such legislation results in excessive federal encroachment, it is repugnant to the Constitution and must be stricken down. *Id.* at 177. In the context of the enumerated Commerce Clause power, this Court has repeatedly emphasized that the ability to regulate interstate commerce is a limited power, and is not analogous to the States' general police power. *Lopez*, 514 U.S. at 566. This Court "enforce[s] the 'outer limits' of Congress's Commerce Clause authority not for [its] own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government." *Gonzales v. Raich*, 545 U.S. 1, 42

(2005) (O'Connor, J., dissenting) (quoting *Lopez*, 514 U.S. at 557).

Here, the panel majority's use of *Chevron* deference to accept the FWS's interpretation of the ESA pushes the boundaries of the Commerce Clause. In *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), this Court considered whether the agency's interpretation of "waters of the United States" as including seasonal ponds was entitled to deference when such interpretation "invokes the outer limits of Congress'[s] power[.]" *Id.* at 172-73. This Court determined that no deference was owed to the agency's interpretation because "the administrative interpretation alters the federal-state framework by permitting federal encroachment on a traditional state power[,]" specifically, "impingement of the States' traditional and primary power over land and water use." *Id.* at 173-74. Moreover, unless there was "a clear indication that Congress intended" the agency "to push the limit of congressional authority[,]" the agency's interpretation was not entitled to deference. *Id.* at 173. This Court then held the agency interpretation unconstitutional because, in regulating nonnavigable, isolated, intrastate waters, the agency exceeded Congress's powers under the Commerce Clause. *Id.* at 172-73.

This case presents almost identical concerns. Here, the FWS has interpreted its authority under the ESA in such an "unprecedented and sweeping" manner that "vast portions of the United States could be designated as 'critical habitat' because it is theoretically

possible, even if not probable, that the land could be modified to sustain the introduction or reintroduction of endangered species." *Markle Interests*, 827 F.3d at 481, 485 (Owen, J., dissenting). Far from being a "clear indication" from Congress that it intended to grant the FWS the authority to designate non-habitat as critical habitat, *see SWANCC*, 531 U.S. at 173, the "language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." *Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). In fact, other courts that have considered the requirements for designation of *unoccupied* critical habitat have concluded that Congress intended the designation to be "more demanding," and a "more onerous procedure" than designating *occupied* critical habitat, which requires *all* of the physical or biological features necessary for the species to inhabit the land. *See Arizona Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2009); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, (9th Cir. 2010); *see also* 16 U.S.C. § 1532(5)(A)(i). Therefore, the panel majority erred in deferring to the agency's expansive interpretation that it "has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features [necessary for the species' survival]." *Markle Interests*, 848 F.3d at 652 (Jones, J., dissenting from denial of reh'g en banc).

The panel majority's interpretation of the Commerce Clause also presents significant federalism concerns. If the ESA grants the FWS the authority to

designate as critical habitat non-habitat with no present relationship to the endangered or threatened species other than containing, at most, one feature essential for survival, then "the [FWS's] critical habitat designation power is virtually limitless." *Markle Interests*, 848 F.3d at 651 (Jones, J., dissenting) (listing physical and biological features the FWS regularly deems essential to species' conservation as including such amorphous categories as "upland areas" and "aquatic breeding habitat"). As this Court explained in *SWANCC*, under the "federal-state framework" of federalism, states have "traditional and primary power over land and water use." 531 U.S. at 173-74; *see also Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality) ("Regulation of land use . . . is a quintessential state and local power."). Similarly, in *Rapanos*, this Court rejected an exercise of federal agency power that would "authorize the [Army] Corps [of Engineers] to function as a *de facto* regulator of immense stretches of intrastate land – an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board."[2] *Id.* at 738 (plurality). Here, the FWS's attempt to regulate private

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[2] Similarly here, the FWS has already expanded upon the panel majority decision by enacting a regulation asserting the authority to designate as unoccupied critical habitat land which does not contain *any* of the physical or biological features necessary for a species' survival. *See* 81 Fed. Reg. 7,414, 7,427 (Feb. 11, 2016). This unprecedented power grab confirms Judge Owen's concern, so quickly dismissed by the panel majority, that now "the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological

land merely because it could, with enough taxpayer money and the owners' permission, be turned into critical habitat, is even more far-reaching than the issue in *Rapanos*. It is simply incompatible with federalism principles to hold that, under the ESA, the FWS may regulate "immense stretches of intrastate land" unconnected to the species that the FWS seeks to protect.[3] *Id.*; *see NFIB*, 567 U.S. at 536-37 (The Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power[ ]" because " 'federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " (quoting *New York v. United States*, 505 U.S. 144, 181 (1992))).

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element (to use the Service's vernacular) essential to the conservation of the species." *Markle Interests*, 827 F.3d at 489 (Owen, J., dissenting).

[3] The numerous rationales underlying our federalist system of government demonstrate why the FWS has overstepped its boundaries here. *See Bond*, 564 U.S. at 221 ("The federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.' " (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))). Here, the critical habitat designation, by the FWS's own estimate, could result in $34 million in lost development value to Petitioners. 77 Fed. Reg. at 35,141. In stark contrast to the options available to Petitioners if such regulatory action were taken by the state or local government, Petitioners have no recourse to petition their government for relief when an unelected federal agency is the regulating entity. *See Markle Interests*, 827 F.3d at 473-74 (Panel majority suggesting that "the decision not to exclude [critical habitat] is unreviewable."); *but see id.* at 491 (Owen, J., dissenting) (agency's decision is not entitled to deference, much less unreviewable).

If there are indeed "[s]ome matters – those not within the bounds of the enumerated powers – [that] are simply beyond the reach of federal hands[,]" this must be one of them. *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 389 (2005).

The panel majority's deference to the FWS's interpretation of the ESA as conferring a boundless regulatory authority threatens the careful balance between local and federal powers that this Court has sought to achieve. Therefore, this Court should grant certiorari to prevent the FWS from interpreting the ESA in such a way that the Commerce Clause power would become coextensive with the states' police power.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE PANEL MAJORITY'S APPLICATION OF THE "SUBSTANTIAL EFFECTS" TEST WOULD PROVIDE NO STOPPING POINT TO FEDERAL AGENCIES' REGULATORY AUTHORITY OVER PRIVATE LAND.

As this Court recently explained, "[o]ur respect for Congress's policy judgments . . . can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *NFIB*, 567 U.S. at 538. In *Lopez*, this Court delineated three categories of activity that Congress may regulate under its Commerce Clause power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) those activities that

"substantially affect" interstate commerce. 514 U.S. at 558-59. At issue here is the third *Lopez* category, whether the FWS's designation of Unit 1 as critical habitat for the dusky gopher frog regulates "activities that substantially affect interstate commerce." *Id.*; *Markle Interests*, 827 F.3d at 475. This Court considers whether the regulated activity at issue is an economic one that, in the aggregate, substantially affects interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942); *Lopez*, 514 U.S. at 561. The panel majority held that the FWS's designation of Unit 1 as critical habitat fell within Congress's Commerce Clause power by looking to whether critical habitat designations, in the aggregate, have a substantial effect on interstate commerce. 827 F.3d at 476 (finding that designation of Unit 1 should be "aggregated with all other critical-habitat designations nationwide"). In defining the regulated activity at issue as the regulation itself, the panel majority further convoluted the already-confused substantial effects jurisprudence among the circuits and landed at a conclusion that directly conflicts with the limits this Court has placed on Congress's Commerce Clause authority.

The circuits have consistently used the "substantial effects" test to circumvent any challenge to federal regulation of intrastate activity. *See Taylor v. United States*, 136 S. Ct. 2074, 2086-89 (2016) (Thomas, J., dissenting) (recognizing that the "substantial effects approach is at war" with the principle that the "Constitution requires a distinction between what is truly national and what is truly local."); Arthur B. Mark, III,

Currents in Commerce Clause Scholarship Since Lopez*: A Survey*, 32 Cap. U. L. Rev. 671, 738-39 (2004) ("*Morrison* and . . . *Lopez*[ ] have not been applied with any degree of impact by lower federal courts. . . . [There is] a need for the Supreme Court to provide a less malleable and more 'rule-like' standard for deciding Commerce Clause cases." (quoting Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L. Rev. 1253, 1308-10 (2003))). Examples of overreaching federal regulation that the circuits have upheld under the substantial effects test are almost too numerous to choose from. *See Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1250-53 (11th Cir. 2008) (determining that Congress had the authority to abolish state tort liability for car rental companies when a rental car is involved in an accident because commercial leasing of cars has a substantial effect on interstate commerce); *United States v. Ho*, 311 F.3d 589, 602-04 (5th Cir. 2002) (aggregating a single instance of improper asbestos removal to find a substantial effect on interstate commerce due to air pollution under the Clean Air Act); *L.S. Starrett Co. v. F.E.R.C.*, 650 F.3d 19, 28-29 (1st Cir. 2011) (agency had power under the Commerce Clause to regulate a hydroelectric generator repair on private land because, without the repair, the electricity would come from an interstate grid); *but see United States v. McGuire*, 178 F.3d 203, 210-11 (3d Cir. 1999) ("Taking the 'effects test' to its logical extreme would for all practical purposes grant the federal government a general police power, the very danger the *Lopez*

Court warned us against." (internal quotation omitted)). As Justice Thomas has repeatedly warned, the "rootless and malleable" substantial effects test results in "Congress appropriating state police powers under the guise of regulating commerce." *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring) ("Unfortunately, we have never come to grips with th[e] implication[s] of our substantial effects formula. . . . [I] want to point out the necessity of refashioning a coherent test that does not tend to 'obliterate the distinction between what is national and what is local and create a completely centralized government.'" (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))).

Nowhere is the confusion regarding the substantial effects test more apparent than in the ESA context. In upholding agency regulation of private land and intrastate species under the ESA, the circuits have relied on varied and conflicting rationales. In *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), the fractured panel majority held that the take of the Delhi Sands flower-loving fly substantially affected interstate commerce but disagreed as to why. One judge on the panel majority relied on the interconnectedness of species and ecosystems and thus aggregated the take of the fly with the take of all species. *Id.* at 1058-59 (Henderson, J., concurring). The other judge hypothesized that the loss of the fly could, in the aggregate, have substantial commercial consequences based on the loss of unknown genetic material and medicinal potential. *Id.* at 1052-53. In *Gibbs v. Babbitt*,

214 F.3d 483 (4th Cir. 2000), the panel majority focused on the economic impact of take of red wolves *as a species* in the aggregate and concluded that, if eradicated, "there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts."[4] *Id.* at 492. In *Rancho Viejo v. Norton*, 323 F.3d 1062, 1072-73 (D.C. Cir. 2003), the court looked to activities and motivations outside the take prohibition to find a substantial effect on interstate commerce. Specifically, the court determined that the regulated activity at issue was "plaintiff's construction project," which it found, was a commercial activity. *Id.* at 1072. In *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), the panel majority refused to aggregate either the future potential scientific benefits of the species at issue or take of the species with other endangered species, but relied on *Raich* to salvage the regulation as an essential part of the ESA's broad regulatory scheme, which it determined was economic.[5] *Id.* at 640. In sum, the circuits have varyingly aggregated take of all species, take of a single species, loss of potential scientific knowledge, commercial activity that may result in the take of a species, and none of the above in order to

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[4] The dissent found "humorous" the suggestion that "the red wolf pelt trade will once again emerge as a centerpiece of our Nation's economy[,]" but highlighted that language as exemplary of the absurd lengths to which courts will go to uphold federal regulation using the "substantial effects" test. *Gibbs*, 214 F.3d at 508-09 (Luttig, J., dissenting).

[5] The Tenth Circuit took the same approach in *PETPO*, rejecting application of the substantial effects test entirely. 852 F.3d at 1005-07.

uphold the regulation of intrastate species. These exercises in judicial gamesmanship seem a far cry from this Court's mandate in *SWANCC* to identify the "precise object or activity that, in the aggregate, substantially affects interstate commerce."[6] 531 U.S. at 173. The fact that the circuits' ESA decisions have provoked significant, vigorous dissents merely reinforces that the "substantial effects" test is not working. *See GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J., dissenting from denial of reh'g en banc) (describing the panel majority's decision as "craft[ing] a constitutionally limitless theory of federal protection" that "offers but a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce."); *Nat'l Ass'n of Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting) ("A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce. There is no stopping point."); *Gibbs*, 214 F.3d at 508 (Luttig, J.,

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[6] In fact, *SWANCC* expressly rejected attempts to define the activity at issue outside the scope of the statute under which the agency was authorized to regulate. 531 U.S. at 173 ("[The precise activity at issue] is not clear, for although the [agency] has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now . . . focus upon the fact that the regulated activity is petitioner's municipal landfill, which is 'plainly of a commercial nature.' But this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." (internal quotation omitted)).

dissenting) ("[I]f the Supreme Court were to render tomorrow the identical opinion that the majority does today . . . , both *Lopez* and *Morrison* would be consigned to aberration.").

The panel majority's decision takes the "substantial effects" test a step farther, effectively erasing any limit on the FWS's authority to regulate any land in the United States. First, it determined that the regulated activity to be aggregated is the regulation itself. This circular conclusion effectively insulates all critical habitat designations – and species listings – from Commerce Clause challenges.[7] If the "regulated activity" at issue is always framed as the regulation itself, whether a critical habitat designation or a species listing (or any other regulation), then a court will always be able to find that the designation of habitat or the

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[7] The panel majority's reliance on *GDF Realty* to find that the ESA is a broad "economic regulatory scheme" under *Raich* further highlights the importance of this Court's review. *See Markle Interests*, 827 F.3d at 476. The ESA is clearly directed at protecting species and their habitat, not at regulating commerce, however broadly one may define that term. Lee Pollack, *The "New" Commerce Clause: Does Section 9 of the ESA Pass Constitutional Muster After* Gonzales v. Raich*?*, 15 N.Y.U. Envtl. L.J. 205, 241-42 (2007) ("[A]ny commercial effects of the [ESA] would be purely incidental to the core of the statutory scheme, which is to preserve natural resources, a non-commercial topic clearly outside of Congress'[s] power to regulate under the Commerce Clause."); Comment, *Turning the Endangered Species Act Inside Out?*, 113 Yale L.J. 947, 952-53 (2004) (Arguing that *GDF Realty* erred in "making [the ESA's] master narrative a story about economics [because] the ESA is not about monetizing endangered species; it is about preserving them in their natural state. . . . The ESA's regulation of interstate commerce is merely circumstantial[.]").

uphold the regulation of intrastate species. These exercises in judicial gamesmanship seem a far cry from this Court's mandate in *SWANCC* to identify the "precise object or activity that, in the aggregate, substantially affects interstate commerce."[6] 531 U.S. at 173. The fact that the circuits' ESA decisions have provoked significant, vigorous dissents merely reinforces that the "substantial effects" test is not working. *See GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J., dissenting from denial of reh'g en banc) (describing the panel majority's decision as "craft[ing] a constitutionally limitless theory of federal protection" that "offers but a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce."); *Nat'l Ass'n of Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting) ("A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce. There is no stopping point."); *Gibbs*, 214 F.3d at 508 (Luttig, J.,

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[6] In fact, *SWANCC* expressly rejected attempts to define the activity at issue outside the scope of the statute under which the agency was authorized to regulate. 531 U.S. at 173 ("[The precise activity at issue] is not clear, for although the [agency] has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now . . . focus upon the fact that the regulated activity is petitioner's municipal landfill, which is 'plainly of a commercial nature.' But this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." (internal quotation omitted)).

dissenting) ("[I]f the Supreme Court were to render tomorrow the identical opinion that the majority does today . . . , both *Lopez* and *Morrison* would be consigned to aberration.").

The panel majority's decision takes the "substantial effects" test a step farther, effectively erasing any limit on the FWS's authority to regulate any land in the United States. First, it determined that the regulated activity to be aggregated is the regulation itself. This circular conclusion effectively insulates all critical habitat designations – and species listings – from Commerce Clause challenges.[7] If the "regulated activity" at issue is always framed as the regulation itself, whether a critical habitat designation or a species listing (or any other regulation), then a court will always be able to find that the designation of habitat or the

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[7] The panel majority's reliance on *GDF Realty* to find that the ESA is a broad "economic regulatory scheme" under *Raich* further highlights the importance of this Court's review. *See Markle Interests*, 827 F.3d at 476. The ESA is clearly directed at protecting species and their habitat, not at regulating commerce, however broadly one may define that term. Lee Pollack, *The "New" Commerce Clause: Does Section 9 of the ESA Pass Constitutional Muster After* Gonzales v. Raich*?*, 15 N.Y.U. Envtl. L.J. 205, 241-42 (2007) ("[A]ny commercial effects of the [ESA] would be purely incidental to the core of the statutory scheme, which is to preserve natural resources, a non-commercial topic clearly outside of Congress'[s] power to regulate under the Commerce Clause."); Comment, *Turning the Endangered Species Act Inside Out?*, 113 Yale L.J. 947, 952-53 (2004) (Arguing that *GDF Realty* erred in "making [the ESA's] master narrative a story about economics [because] the ESA is not about monetizing endangered species; it is about preserving them in their natural state. . . . The ESA's regulation of interstate commerce is merely circumstantial[.]").

listing of the species substantially affects interstate commerce in the aggregate. *See Markle Interests*, 827 F.3d at 475-76. This novel interpretation of the Commerce Clause "would open a new and potentially vast domain to congressional authority." *NFIB*, 567 U.S. at 552 (opinion of Roberts, C.J.).

Second, the panel majority's decision ignores this Court's rule in *Morrison* that the link between the regulated activity and a substantial effect on interstate commerce must not be so attenuated as to leave no logical stopping point to the Commerce Clause power. 529 U.S. at 615 (rejecting "a method of reasoning that . . . [is] unworkable if we are to maintain the Constitution's enumeration of powers."); *see Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 198 (1974) (Rejecting Commerce Clause theory that "has no logical endpoint[]" and where "[t]he universe of arguably included activities would be broad and its limits nebulous in the extreme."). Under the panel majority's decision, "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." *Markle Interests*, 827 F.3d at 488 (Owen, J., dissenting). The majority's attempts to "cabin[]" the implications of granting the FWS powers more befitting a local zoning board fall short of providing a limiting principle. *Id.* at 488-89 (explaining the majority's contradictory conclusions that one physical or biological feature is necessary for designation, but that any land may be designated so long as it can be modified to contain such

feature). Indeed, following the panel majority decision, the FWS quickly implemented a regulation asserting that the ESA authorizes it to designate as critical habitat any unoccupied land it deems essential to the survival of a species, regardless of the presence of physical or biological features necessary for survival. 81 Fed. Reg. at 7,427. The FWS has thus unambiguously declared the path it intends to follow under its newfound authority – a path that "carr[ies] us [far] from the notion of a government of limited powers." *See NFIB*, 567 U.S. at 551 (opinion of Roberts, C.J.).

The ESA may be the "pitbull of all environmental legislation," but the Commerce Clause does not allow the FWS to reach private lands unconnected to any endangered or threatened species save for the presence of, at most, only one of the biological features necessary to sustain the species. This Court has emphasized that the government may not "pile inference upon inference" to make the connection between a regulated activity and interstate commerce. *Lopez*, 514 U.S. at 567. To maintain a "distinction between national and local authority[,]" *Morrison*, 529 U.S. at 615, the Commerce Clause must not be construed to allow the FWS to regulate private land that is not habitable and has no prospect of becoming so.

The Constitution must be interpreted to give effect to all its clauses. *See Marbury*, 5 U.S. at 174 ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."); *Lopez*, 514 U.S. at 588 (Thomas, J., concurring)

("After all, if Congress may regulate all matters that substantially affect commerce," then "many of Congress' other enumerated powers under Art. I, § 8[ ] are wholly superfluous."). However, under the "substantial effects" test, "[e]ven such a seemingly parochial action as borrowing a cup of sugar from a neighbor can be viewed as part of the stream of commerce that extends to refineries overseas." *McGuire*, 178 F.3d at 210. Justice Thomas's concern that the substantial effects test, "if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life[,]" is certainly borne out by the panel majority's decision below. *See Lopez*, 514 U.S. at 584 (Thomas, J., concurring); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1418 (1987) (explaining that, in announcing the substantial effects test, "the Court acted as though any exercise of the congressional jurisdiction were benign").

In sum, under the panel majority's interpretation, the "substantial effects" test is merely an exercise in judicial imagination such that "one *always* can draw the circle broadly enough to cover the activity[.]" *Lopez*, 514 U.S. at 601 (emphasis in original) (Thomas, J., concurring). Drawing that circle so large that a federal agency may regulate any land in the United States under the auspices of the ESA is simply more weight than the Commerce Clause can bear. Therefore, this Court should take the opportunity to clarify the "substantial effects" test in order to place some limits on a federal agency's ability to regulate under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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RECORD AND BRIEFS

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 17-71 and 17-74

In The Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

MARKLE INTERESTS, L.L.C., ET AL.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Petitions for Writs of Certiorari To The United States Court Of Appeals For the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS and AMERICAN FOREST RESOURCE COUNCIL SUPPORTING PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders ("NAHB") states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

Amicus American Forest Resource Council ("AFRC") is an Oregon non-profit corporation with its principal place of business in Portland, Oregon. AFRC has no corporate parents, subsidiaries or affiliates and does not issue stock. No publicly-held company has a ten percent or greater ownership of AFRC.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and account for 80% of all homes constructed in the United States.

Many of NAHB's members, such as Petitioners, are private landowners with reasonable expectations regarding the lawful use of their property. Since a predominant number of the species protected under the Endangered Species Act ("ESA") have the major share of their habitat on private land, critical habitat decisions significantly impact NAHB's members.

The American Forest Resource Council ("AFRC") is a regional trade association whose purpose is to advocate for sustained-yield timber harvests on

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout California, Idaho, Montana, Oregon, and Washington. Many of AFRC's members have their operations in communities adjacent to federal and state forestlands, and the management of these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves.

AFRC's members, and the communities in which they work, have been affected by reductions in timber harvest resulting from critical habitat designations, on federal, state, and private land, for species such as northern spotted owl, marbled murrelet, and Canada lynx. AFRC members' timber contracts have been suspended, slowed or cancelled as a result of overbroad critical habitat designations. Overbroad designations also threaten AFRC member interests in forest health, federal timber supply, and private forest land because those designations impede forest management projects that promote forest health and provide timber supply.

SUMMARY OF ARGUMENT

The Fifth Circuit upheld the Fish and Wildlife Service's ("the Service") designation of Unit 1 as unoccupied critical habitat, even though the Service recognized that the area was not suitable habitat for the gopher frog. By deferring to the Service's designation, the court below failed to heed the strict statutory standards on the designation of critical habitat.

Consequently, by allowing the Service to employ such broad authority, the Fifth Circuit's decision will have enormous economic impacts on industries like home building and forestry that rely on the use of private and public lands.

Finally, the Fifth Circuit found that it could not review the Service's decision not to exclude the Petitioner's property from its critical habitat determination because, in its view, Congress failed to provide a standard by which to review the Service's decision. The Fifth Circuit's holding conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997), and raises serious constitutional questions under Article I.

For these reasons, *amici* respectfully request that the Court grant *certiorari*.

ARGUMENT

I. THE COURT OF APPEALS' APPROACH IMPROPERLY APPLIES SCIENTIFIC DEFERENCE TO A LEGAL QUESTION.

The Fifth Circuit's decision is at odds with the structure of the Endangered Species Act ("ESA"). As such, it represents a troubling expansion of the Service's narrow delegated authority, essentially authorizing the Service, though the vehicle of *Chevron* deference, to rewrite the statute. *Certiorari* is warranted to establish a uniform standard for critical habitat designation that is a permissible construction of the statute.

The ESA allows the Service to designate critical habitat that is either "occupied" or "unoccupied" by the listed species. 16 U.S.C. § 1532(5)(A). Occupied habitat must include "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection[.]" 16 U.S.C. § 1532(5)(A)(i)[2]. The features in clause (I) are called primary constituent elements or PCEs by the Service. *See Cape Hatteras Access Pres. All. v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 120-21 (D.D.C. 2004); 50 C.F.R. § 424.12(b)(5) (2012). On the other hand, unoccupied critical habitat may be designated only "upon a determination by the Secretary that such areas are essential for the

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[2] *Cf.* 16 U.S.C. § 1532(5)(C)("Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.").

conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

Occupied critical habitat is a subset of the range of the species at the time of listing; it includes "specific areas within the geographical area occupied by the species...." 16 U.S.C. § 1532(5)(A)(i). Similarly, unoccupied critical habitat is a subset of the area outside the species' range; it includes "specific areas outside the geographical area occupied by the species...." 16 U.S.C. § 1532(5)(A)(ii). Despite this parallel structure, subsection (ii) does not recite the specific requirements that are listed for occupied critical habitat. Instead, the reference to "essential" is legislative shorthand. And the use of "specific areas" in both sections carries with it the "cluster of ideas" embodied in the definition of occupied habitat. *Cf.*, e.g., *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 861-62 (2014). That is, both types of critical habitat must contain PCEs, those biological or physical features essential to the conservation of the species.

Moreover, "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 132 S. Ct. 1997, 2004–05 (2012) (citations and quotation marks omitted). Acts of Congress "should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995). As such, the use of "essential" in paragraph (A)(ii) carries the standards listed in paragraph (A)(i) to guide the Secretary's determination. If Congress wanted the Secretary to

have a freer hand, it would have said something—anything—other than "essential." But it did not.

The Service concedes that Unit 1 does not contain all the PCEs of critical habitat, and no one contends otherwise. Instead, it determined this unit was "essential to the conservation of the species"

> because this species is at high risk of extirpation from stochastic events, such as disease or drought, and from demographic factors such as inbreeding depression. The establishment of additional populations beyond the single site known to be occupied at listing is critical to protect the species from extinction and provide for the species' eventual recovery.

77 Fed. Reg. 35,118, 35,121 (June 12, 2012); *see id.* at 35,132.

The Fifth Circuit gave the Service's definition controlling weight, combining *Chevron* deference with the deference owed to an agency making scientific determinations. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 464-65 (5th Cir. 2016) (discussing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). It cited, with hearty approval, to *Medina County Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) for the proposition that "[w]here an agency's particular technical expertise is involved, we are at our *most deferential* in reviewing the agency's findings." *Markle*, 827 F.3d at 465 (emphasis added). In any further litigation regarding impacts on gopher frog critical habitat,

the Service will get a *third* layer of deference as it interprets its own critical habitat regulation. *See, e.g., Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 613-14 (2013); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 991 (9th Cir. 2010).

This "super-deference" led the court astray. Instead of evaluating whether the Service's interpretation of the statute was reasonable, as a *legal* matter, it in effect deferred to the Service's scientific determination in assessing whether the designation survived *Chevron* step two. *Markle*, 827 F.3d at 464-465. Applying scientific deference to statutory interpretation takes *Chevron* too far. The Service's disregard of the statutory standards for critical habitat designation and the Fifth Circuit's use of *Chevron* to authorize amendment by regulation, have national effects of significant importance.

As a policy matter, the Service's use of a relaxed threshold for unoccupied critical habitat, not requiring presence of all the PCEs when outside the species' range may have some logic to it. Because of the "jeopardy" protection for listed species, designation of occupied critical habitat is arguably redundant and therefore less important. Indeed, the Service has stated in the past that "the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources." Endangered and Threatened Wildlife and Plants; Final Rule to Designate Critical Habitat for the Santa Ana Sucker (Catostomus santaanae), 70 Fed. Reg. 426 (Jan. 4, 2005). But that is not the

way Congress wrote the statute. In keeping with its intent that the agency be "exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species,"[3] Congress imposed specific requirements that the Service must meet. The Fifth Circuit erred in allowing the Service to disregard those requirements.

II. THE SERVICE'S DESIGNATION OF UNINHABITABLE AREAS AS CRITICAL HABITAT WILL INFLICT SEVERE COSTS ON LANDOWNERS AND THE AVERAGE CITIZEN WITH NO CORRESPONDING BENEFITS TO SPECIES.

"Critical-habitat designation is consequential." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 638 (5th Cir. 2017) (dissenting from denial of reh'g *en banc*) (*"Markle Interests"*). The Fifth Circuit's deference to the Service's interpretation of "essential" is problematic because it allows designation of lands that "do not currently contain the essential physical or biological features of critical habitat." *See* 77 Fed. Reg. 35,118, 35,135 (June 12, 2012); *see also id.* at 35,129 (noting that Unit 1 is a "closed-canopy forest unsuitable as habitat for dusky gopher frogs" that do not contain the PCEs of critical habitat). As Judge Owen's dissenting opinion correctly observed, under this definition of "essential," then "vast" areas "could be designated as 'critical habitat' because it is

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[3] H.R. REP. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, at 9468, 1978 WL 8486.

theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species." *Markle*, 827 F.3d at 481 (Owen, J., dissenting).

For the Louisiana landowners, whose 1,544 acres ("Unit 1") have been designated unoccupied critical habitat for the dusky gopher frog, the Service has calculated a $33.9 million loss in residential and commercial development opportunities. 77 Fed. Reg. at 35,118, 35,141. This conservative figure does not account for the lost option on foreseeable oil and gas development, mineral development, timber harvest, recreational use or hunting leases.[4] It also understates the true costs of Section 7 consultation and wholly fails to consider the expensive and time-consuming pre-consultation process.[5] A complete

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[4] Landowners have offered the Service verifiable proof of on-site untapped oil and gas reserves of $17.1 million, mineral deposits of up to $247,350, timber resources of $6.93 million and annual hunting lease revenues of $9,844. Industrial Economics, Inc., *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, 4-1, 4-5, 4-8, 4-9 (April 6, 2012) *available at* https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157 (*last visited* Aug. 8, 2017).

[5] Computation of only the time and level of effort spent following the "official" start of consultation underrepresent the true cost of the consultation process. A recent study out of the University of Texas found that pre-consultation lasts 8 months or more, depending on the scope of the project. Melinda Taylor, et. al., *Protecting Species or Endangering Development? How Consultation Under the Endangered Species Act Affects Energy Products on Public Lands*, Kay Bailey Hutchison Center for Energy, Law & Business, Research Paper No. 2016-03, p.8 (Aug. 2016) *available at* http://sites.utexas.edu/

picture would further have considered the costs of actions likely to be undertaken by the landowners outside of the consultation process, such as a reduction in the development's buildable envelope to avoid the difficulties and expense of formal consultation. *See* Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10678 (August 2013) (discussing efforts undertaken by landowners before and after consultation to avoid the even greater costs and burdens of formal consultation). Despite the Service's failure to quantify any direct monetary or "biological" benefits to the frog flowing from the designation, it found its "economic impact analysis did not identify any disproportionate costs." 77 Fed. Reg. at 35,141. In contrast, the six judges who dissented from denial of *en banc* review described the findings of the impact analysis as "shocking," particularly so in light of the fact that "there is virtually nothing on the [benefit] side of the economic ledger." *Markle Interests*, 848 F.3d at 653. The Service's flawed economic analysis clearly merits further review.

As detailed above, the project-level toll of a critical habitat designation can be immediate and significant, "resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath at 10681. However, the bigger story here is the regulatory trickle-down to the consumer. A recent study by NAHB reveals

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kbhenergycenter/files/2016/08/ESA-Report.pdf (*last visited* Aug. 7, 2017).

that, on average, compliance with regulation during lot development accounts for 14.6 percent of the final price of a new single-family home. Equally disturbing is the fact that the cost of regulation during development, which is ultimately added onto the lot price when a home is sold, is rising more than twice as fast as the average American's ability to pay for it. Paul Emrath, *Government Regulation in the Price of a New Home*, p. 5, 8, Special Studies (May 2, 2016), *available at* https://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311. The designation of backup critical habitat that is presently uninhabitable but that may "someday become useful to the [listed species]" will only fuel this alarming trend. *Alliance for the Wild Rockies v. Lyder*, 728 F.Supp.2d 1126, 1142-1143 (D. Mont. 2010). Absent an unoccupied critical habitat designation, the ESA and the avalanche of regulatory costs that follow would not apply to private land.

Consider that the most common type of federal permit requiring Section 7 consultation with wildlife agencies is a permit authorizing the discharge of dredge or fill material into waters of the United States.[6] These permits are issued by the Army

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[6] Under Section 7(a)(2) of the ESA (16 U.S.C. § 1536(a)(2)), each federal agency must consult with the Service to "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or [. . .] result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). Agency regulations define federal agency "action" to include the issuance of permits for projects carried

Corps of Engineers ("Corps") and are authorized under Section 404 of the Clean Water Act ("CWA"). 33 U.S.C. § 1344. They rank amongst the most common, if not the most common, permit that developers must obtain to provide housing for the nation's citizens. Annually, the Corps issues approximately 72,000 Section 404 permits (13-year average), and "over $220 billion of investment annually is conditioned on the issuance of these discharge permits." David Sunding, The Brattle Group, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal*, p. 1 (May 30, 2011);[7] Institute for Water Resources, *The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources*. 2015-R-03, p. 25-26 (October 2015).[8]

As highlighted by the designation of Unit 1, the Service has become "increasingly aggressive in exploiting the Section 7 consultation process to control how land and water resources are used." Norman James and Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and its Improper Transformation into*

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out by private development interests. 50 C.F.R. § 402.02 (2016).

[7] *Available at* http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Mingo%20Logan%20Coal%20Co%20Inc%20v.%20EPA%20%28Sunding%20Economic%20Study%29.pdf (*last visited* Aug. 8, 2017).

[8] *Available at* http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2015-R-03.pdf (*last visited* Aug. 7, 2017).

"Recovery" Habitat, 34 UCLA J. ENVTL. L. & POL'Y 1, 6-7 (2016). The Endangered Species Act does not permit the Government to designate an area as 'critical habitat,' and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence of the species and significant alterations to the area as a whole would be required. *Markle*, 827 F.3d at 481 (Owen, J., dissenting).

However, the Service has done just that with Unit 1. Through a CWA 404 permit nexus it has triggered the ESA and federalized the entire property for purposes of Section 7. With this, it has "recommend[ed] that no development occur within the unit" or, perhaps, may allow 40 percent of the unit to be developed under the "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." 77 Fed. Reg. at 35,141; *id.* at 35,123.

Similarly, this "unprecedented and sweeping" interpretation of unoccupied habitat is economically disastrous for industries dependent on public lands—like forest product manufacturers. A quintessential example is the designation of critical habitat for the northern spotted owl, one of the most controversial wildlife species listed under the ESA. In 2012, the Service designated 9,577,969 acres (roughly twice the size of the State of New Jersey) of forest land in California, Oregon, and Washington to be set aside for the owl. Endangered and Threatened Wildlife and Plants: Designation of Revised Critical Habitat for the Northern Spotted

Owl, 77 Fed. Reg. 71,876 (Dec. 4, 2012); *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 2 (D.C. Cir. 2017) ("[I]magine driving all the way up and then all the way back down the New Jersey Turnpike, and you will get a rough sense of the scope of the [2012 northern spotted owl] critical habitat designation here. The critical habitat designation means that a huge swath of forest lands in the Pacific Northwest will be substantially off-limits for timber harvesting.").[9] Of the lands designated as critical habitat, more than 2.6 million acres are "matrix lands," which were set aside under the Northwest Forest Plan to provide a steady supply of federal timber to the local forest products-based economy. 77 Fed. Reg. at 71,876; *id.* at 71,880 (noting that "matrix areas [are] where timber harvest would be the goal.") The Service estimated that approximately 6.5 percent (roughly 622,000 acres) of northern spotted owl critical habitat is likely to be unoccupied. 77 Fed. Reg. at 72,028. The true number is likely far higher.

In identifying unoccupied areas, the Service concluded that the critical habitat should contain "essential physical and biological features *or* is otherwise essential because it has the highest likelihood of meeting recovery objectives in the most efficient manner . . . ." 77 Fed. Reg. at 71,916 (emphasis added). The Service acknowledged that even though some unoccupied areas "lack[ ] some

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[9] Carpenters Industrial Council, AFRC, Siskiyou County, and several individual timber companies challenged the Service's final critical habitat rule for the northern spotted owl, in part, because the designation was based on a flawed modeling framework. *Zinke*, 854 F.3d at 1.

element of the physical or biological features, such as large trees or dense canopies that are associated with nesting habitat," those lands "contain proportionally greater areas of younger forests that are essential for the conservation of the species, because *they can develop additional habitat necessary to support viable northern spotted owl populations in the future*." 77 Fed. Reg. 71,917 (emphasis added). Thus, like with the gopher frog, the Service designated habitat that does not currently contain the essential physical or biological features of critical habitat essential for the owl.

The economic impacts resulting from overbroad critical habitat designations – like the northern spotted owl – are significant. The Service concluded that "economic impacts to [Forest Service] timber harvest are relatively more likely in unoccupied matrix lands or approximately 1,158,314 acres of 2,629,031 total acres of all [Forest Service] matrix lands." 77 Fed. Reg. at 72,028. The resulting decrease in timber supply is substantial. *Id.*

Without a more demanding and narrow interpretation of unoccupied areas compared to occupied areas, the Service is free to designate any land that contains a trifling physical or biological feature essential to a species conservation, or no such feature – a boundless authority that is in conflict with the plain language of the ESA. As illustrated by the examples above, the potential economic consequences of "virtually limitless" authority to reach, and further encumber, "vast portions of the United States" through uninhabitable critical habitat designations will be

severe. *Markle Interests*, 848 F.3d at 651; *Markle*, 827 F.3d at 481.

Certiorari is warranted to avoid unnecessary and significant economic burdens on private landowners and industries that depend on public lands.

III. THESE PETITIONS RAISE IMPORTANT QUESTIONS UNDER THE NONDELEGATION DOCTRINE.

The Fifth Circuit determined that the Service's decision not to exclude Unit 1 from its critical habitat determination was unreviewable pursuant to the Administrative Procedure Act ("APA") because Congress provided no manageable standard to determine whether that decision was proper. When Congress delegates its authority without providing standards to which an agency must conform, it raises serious constitutional concerns under Article I. U.S. CONST. art. I. There is an unresolved tension between Article I and APA section 701(a)(2) when Congress fails to provide standards to which an agency must conform its action. This petition provides an excellent vehicle to rectify this tension.

The APA "embodies the basic presumption of judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140, (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). However, section 701(a)(2) of the APA provides that it does not apply to "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Court has interpreted section 701(a)(2) to mean that

judicial "'review is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

The ESA provides that the Service must take "into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Furthermore, Congress provided that the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . ." *Id.* Petitioners argued that the government acted arbitrarily in deciding not to exclude Unit 1 from the Service's critical habitat determination. The Fifth Circuit never reached this argument, instead holding that the APA precluded judicial review. *Markle*, 827 F.3d at 474.

The Fifth Circuit explained that there "are no manageable standards for reviewing the Service's decision not" to exclude Unit 1 from the critical habitat designation. *Id.* at 473. It further stated that 16 U.S.C. § 1533(b)(2) "establishes a discretionary process by which the Service may exclude areas from designation, but it does not articulate any standard governing when the Service must exclude an area from designation." *Id.* at 474. In other words, because the ESA provides no standard to determine if the Service correctly determined not to exclude Unit 1 from critical

habitat, that decision (according to the Fifth Circuit) is unreviewable under section 701(a)(2)'s "no meaningful standard" test.

Comparably, Article I of the Constitution vests all legislative powers in the Congress of the United States. "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Powell, J., concurring). This is known as the nondelegation doctrine. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (explaining that Article I permits no delegation of Congress's legislative powers). However, "[i]f Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *E.g.*, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added). "The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Loving v. United States*, 517 U.S. 748, 771 (1996). Furthermore, the Court has explained that Congress has failed to state an intelligible principle if "there is an *absence of standards* for the guidance of [an agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of

Congress has been obeyed . . ." *Yakus v. United States*, 321 U.S. 414, 426 (1944) (emphasis added); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, C.J., concurring) (explaining that the intelligible principle rule requires "ascertainable standards" by which a court can test the exercise of delegated legislative discretion).

Therefore, APA section 701(a)(2) provides that judicial review is precluded if Congress fails to provide a "meaningful standard" by which a court can judge whether an agency properly exercised its discretion. However, the nondelegation doctrine provides that if Congress fails to provide a standard then it has failed to provide an "intelligible principle" and such a delegation is unconstitutional. As commentators have explained, "[i]f a statute is so broad that it lacks a guiding policy, the statute may lack an intelligible principle, in violation of the nondelegation doctrine." Viktoria Lovei, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*? 73 U. CHI. L. REV. 1047, 1060 (2006); *see* Amee B. Bergin, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?* 28 B.C. ENVTL. AFF. L. REV. 363, 396 (2001) (arguing that "[i]f a court finds that a delegation lacks 'law to apply,' it follows analytically that not only *can* the court find that the delegation lacks an intelligible principle, but that it *must* do so"). Thus, there is a clear tension between the nondelegation doctrine and APA section 701(a)(2).

The Fifth Circuit found that 16 U.S.C. § 1533(b) provides no meaningful standard to review the Service's decision not to exclude Unit 1 and therefore precluded review under 5 U.S.C § 701(a)(2). Accordingly, under the nondelegation doctrine Congress also failed to provide an intelligible principle, leading to the conclusion that such a delegation is unconstitutional. The Fifth Circuit, however, did not explore the consequences of its reasoning on the constitutionality of Congress's delegation to the Service.

Had the Fifth Circuit explored those consequences, it would have found a ready answer in *Bennett*. In *Bennett*, this Court addressed whether a challenge to a critical habitat designation was properly reviewed under the ESA citizen suit provision, 16 U.S.C. § 1540(g)(1)(C), which allows a plaintiff to enforce a non-discretionary duty under section 1533 of the ESA. *Id.* at 171-72. The Court found the designation was reviewable under section 1540 to the extent it violated the "categorical requirement that, in arriving at his decision, [the Secretary] 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" *Id.* at 172 (quoting 16 U.S.C. § 1533(b)(2)). The Court qualified this by stating "the Secretary's ultimate decision," *i.e.* the ultimate decision whether to exclude, "is reviewable only for abuse of discretion," that is, under the APA. *Id.* at 172. This last statement immediately follows a quotation of the Secretary's authority to exclude. *Id.* Thus, this Court's precedent and the avoidance canon point in the same direction, which is to permit

review of the Service's decisions on whether to exclude habitat due to the impact of a designation.

These Petitions provide the Court with a valuable opportunity to realign administration of the ESA with the nondelegation doctrine and *certiorari* should therefore be granted.

CONCLUSION

For the reasons above, *amici* respectfully request that the Court grant the Petitions for *certiorari*.

August 14, 2017

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RECORD AND BRIEFS

Nos. 17-71, 17-74

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In The

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* SAN JUAN COUNTY, UTAH IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

San Juan County[1] spans 6.2 million acres and is the largest county in the State of Utah. San Juan County is pretty much the same size as the entire State of Massachusetts. However, over 80% of the land in San Juan County is owned by the United States outright, or managed as reservation or restricted land, leaving only 405,000 acres (8%) of private, taxable land in the county. The small percentage of private land in San Juan County is primarily located along Utah's eastern border with the State of Colorado and largely involves family farms, ranches and agricultural lands that are the mainstay of San Juan County's rural economy.

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[1] Pursuant to Rule 37.2, all parties with counsel of record on the docket have consented to the filing of this brief. *Amicus Curiae* decided to file this brief less than ten days before the due date and therefore did not obtain written consent to this filing more than ten days in advance. However, counsel for Respondent U.S. Fish and Wildlife Service provided written consent to this filing, as did counsel for Respondent Center for Biological Diversity. The written consents of Respondents have been filed with the Clerk of the Court. Counsel for Petitioners provided written consent to the filing of *amicus curiae* briefs as shown by docket entry dated July 18, 2017.

Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* made a monetary contribution to its preparation or submission.

In 2014, the U.S. Fish and Wildlife Service (Service) promulgated two companion regulations that listed the Gunnison sage-grouse as a threatened species, and then designated 1.4 million acres of occupied and unoccupied critical habitat in both Colorado and Utah. *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Gunnison Sage-Grouse; Final Rule, 79 Fed. Reg. 69311 (Nov. 20, 2014). True to the Gunnison sage-grouse's name, sagebrush is the Primary Constituent Element (PCE) of Gunnison sage-grouse habitat. More than just patches of sagebrush, the Gunnison sage-grouse requires vast expanses of sagebrush interspersed with meadows and specific herbaceous forbs for feeding and breeding.

When the Service designated the occupied and unoccupied critical habitat for the Gunnison sage-grouse in 2014, it very much avoided designating its own federal lands in San Juan County – there were millions of federal sage-brush-covered acres at its fingertips to choose from – but the Service drew gerrymandered boundaries that excluded its own federal land. *See* Appendix. As a general matter, the white colored areas in the included habitat map of Utah are federal lands that the Service chose not to designate as critical habitat for the Gunnison sage-grouse. With the understanding that there is no wall between Utah and Colorado, it is plain to see that the habitat boundaries drawn by the Service very much reacted to political, not species, boundaries. With the understanding that

nature abhors a straight line, there is no rational reason for the Service's exclusion of Montezuma County, Colorado, or the southern part of San Juan County.

The tens of thousands of acres of unoccupied habitat between the Colorado state line and Monticello, Utah, are not "habitat" acres, but are generally farmlands, agricultural lands and even whole towns. Over the vigorous objections of San Juan County and others, the Service proceeded to designate 146,000 acres of mostly private land in San Juan County as "critical habitat" that was "essential" for the recovery of the species.

As it now stands, the Service designated **35% of all the private land in San Juan County** as critical habitat for the Gunnison sage-grouse. The unoccupied private land that the Service determined to be critical habitat "essential" to the recovery of the Gunnison sage-grouse is overwhelmingly cultivated hay farm and agricultural land. Those farmers do not grow sage brush, nor is there any reasonable expectation that they will in the future.

There is not even a gambling chance that the Service took a meaningful step toward the recovery of the Gunnison sage-grouse by designating tens of thousands of acres of private agricultural lands and hay farms as critical habitat for the species. Equally, there is not even a gambling chance that the Service took a meaningful step toward the recovery of the dusky gopher frog by designating 1,500 acres of unoccupied private land in Louisiana as critical habitat.

San Juan County is now an intervenor-plaintiff in a lawsuit against the Service challenging its designation of critical habitat for the Gunnison sage-grouse. *See Center for Biological Diversity, et al. v. United States Fish and Wildlife Service, et al.*, Civil No. 1:15-cv-130 (consolidated) (D. Colo.). This lawsuit is in the early briefing stage, meaning that this Court's review and decision of the issues presented by the Petition for a Writ of Certiorari of Markle Interests, LLC (Pet.) will have effect in other pending litigation.

SUMMARY OF ARGUMENT

The Service is a federal agency and federal agency actions are subject to judicial review under the Administrative Procedure Act. *See* 5 U.S.C. §§ 551 *et seq*. Petitioner Markle Interests, LLC, presented the Court with the background facts and law at issue under the Endangered Species Act (ESA). San Juan County, as *Amicus Curiae*, does not seek to repeat or duplicate the legal issues and arguments presented, but attempts to inform the Court of other circumstances and ongoing litigation that may be affected by this Court's review. Simply stated for the Court, the Service internally decides when it needs to find more acres – not actual habitat, just more acres – to call habitat. The Service randomly found more acres for the dusky gopher frog in Louisiana. A couple of years later, the Service decided it needed to find more acres for the Gunnison sage-grouse in San Juan County. It did so by randomly designating a large number of farms and ranches in

San Juan County as unoccupied, but somehow essential, habitat for the Gunnison sage-grouse. The Service does not really expect to create or provide habitat for the species on the designated private land, which raises the question of whether its action was arbitrary, capricious or an abuse of discretion.

ARGUMENT

"For the first time in the history of the Endangered Species Act, the U.S. Fish and Wildlife Service designated private land as critical habitat that is uninhabitable by and has no connection to a listed species." Pet. 18. The Markle Interests private lands were designated in 2012. Two years later, the Service designated tens of thousands of acres of private land in San Juan County as unoccupied critical habitat for the Gunnison sage-grouse. The Service did so even though most of the land is entirely uninhabitable by the grouse and has no viable chance to become habitat for the species. In designating the private farmland as expected habitat, the Service acknowledged the problem. "Unoccupied lands are designated here because they are 'essential for the conservation of the species' and these areas do not stop at land ownership boundaries." 79 Fed. Reg. at 69321. "We recognize that in areas with a high proportion of private ownership and with more intensive land uses (such as agriculture), the conservation of these populations will be more difficult than in less developed areas." *Id.*

This carefully crafted administrative language admits that the Service does not control the uses of private land, but hopes that others will follow along. "Our landscape level approach used in this critical habitat designation generally does not consider land ownership." 79 Fed. Reg. at 69321.

I. The Plain Language Of The Statute Requires The Designated Land To Actually Be Habitat.

Congress never authorized the Service to designate random land or water for the conservation of any species. Rather, it authorized the agency to designate "habitat." Critical habitat under the ESA, by definition, includes only the "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). The "physical or biological features" that satisfy the ESA's requirements are termed Primary Constituent Elements (PCE). 50 C.F.R. § 424.14(b)(5). PCEs must be "found" on occupied land before that land can be eligible for critical habitat designation. 16 U.S.C. § 1532(5)(A)(i). "That PCEs must be 'found' on an area is a prerequisite to designation of that area as critical habitat." *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 122 (D.D.C. 2004). The Service is prohibited from over-designating habitat and must instead "mount[] the proper effort to

ensure that PCEs do exist on designated lands." *Id.* at 122-23. "The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation." *Id.*

Equally, unoccupied lands must provide "critical habitat" that is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). By the plain language of the statute, beyond providing habitat and habitat that is critical, the unoccupied lands must be "essential" for the conservation of the species.

And so it is that separate from the Service's desire to find more acres – any acres will do – the plain language of the statute requires that unoccupied areas of critical habitat must be 1) habitat suitable for the species, 2) critical, which is something more than general or potential, and 3) essential, being necessary. With these congressional words of limitation in mind, it is impossible to say that uninhabitable land in Louisiana is essential, critical or even habitat for the dusky gopher frog.

II. The Service Must Analyze And Quantify The Economic Impacts Of Designating Land As Critical Habitat.

Section 4(b)(2) of the ESA requires the Service to "designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C.

§ 1533(b)(2). If the benefits of excluding an area from designation outweigh the benefits of including it as critical habitat, the Service may exclude it from designation if doing so would not result in the listed species' extinction. *Id.* The regulations clarify that the designation is to be made "after taking into consideration the probable economic and other impacts." 50 C.F.R. § 424.12(a). The "economic and other impacts resulting from the designation of critical habitat will cover all activities affecting or affected by the proposed critical habitat designation." 49 Fed. Reg. 38900, 38907 (Oct. 1, 1984) (preamble to rule codified at 50 C.F.R. § 424). As presented by Markle Interests, the Service failed to address the economic benefits (or detriments) of designating uninhabitable land as critical habitat.

CONCLUSION

For the foregoing reasons, San Juan County respectfully requests the Court to grant the Markle Interests, LLC, Petition for a Writ of Certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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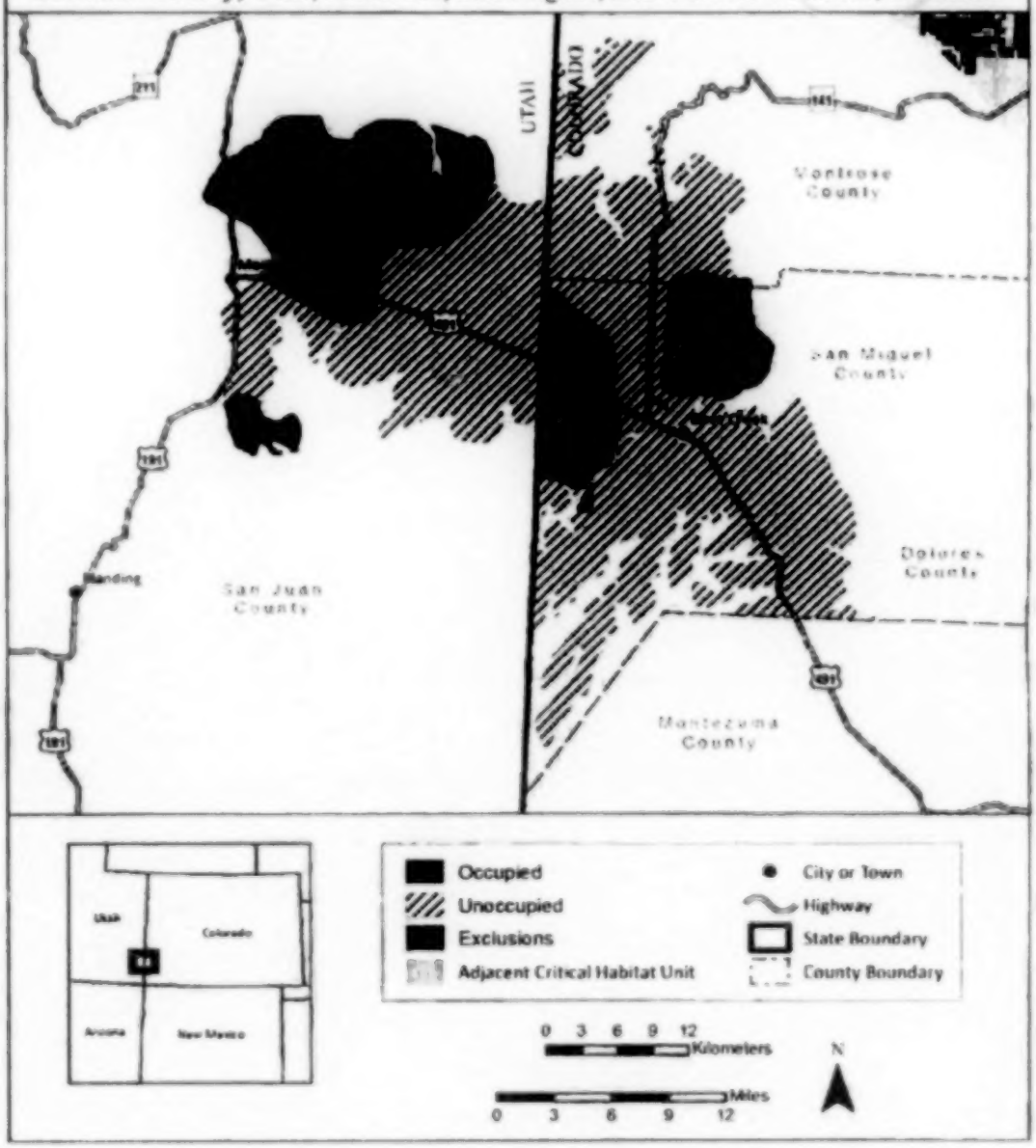
Unit 1: Monticello-Dove Creek

San Juan County, Utah; Montrose, San Miguel, and Dolores Counties, Colorado



Supreme Court, U.S.
FILED
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RECORD AND BRIEFS

Nos. 17-71 and 17-74

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

MARKLE INTERESTS, L.L.C., et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species. Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and, does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. On denial of an en banc rehearing, six judges filed a thirty-two page dissent calling for further review because the panel decision gave the government "virtually limitless" power to designate critical habitat and "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."

Petitioners state several questions in their respective Petitions. *Amicus* writes separately regarding the following question:

Whether an agency decision to not exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1976, Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated, both in and out of the courtroom, for the protection of private property interests from unconstitutional takings. This aspect of its advocacy is reflected in regular representation of property owners challenging overreaching governmental actions in violation of their property rights. Additionally, SLF frequently files *amicus curiae* briefs at both the state and federal level in support of property owners. *See Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Council*, 505 U.S. 1003 (1992); and *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

This case is of particular interest to SLF because the Fifth Circuit's holding that the U.S. Fish and Wildlife Service's (Service) decision to not exclude Petitioners' land from critical habitat violates this Court's

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[1] All parties have consented to the filing of this brief by blanket consent or individual letter, and the parties were notified of *amicus curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

precedent, disregards the presumption of reviewability, and as Judge Jones explained for the six-member dissent from the denial of rehearing en banc, represents an "abdication" of the judiciary's responsibility to oversee agency action in accordance with the Administrative Procedure Act. *Markle Interests L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 636 (5th Cir. 2017) (Jones, J., dissenting). The "ramifications" of the panel majority's decision for, among other things, "judicial review of agency action cannot be underestimated." *Id.* at 637.

SLF agrees with that assessment. Over the last decade, the administrative state has grown in two primary ways – through the launching of new agencies and through the growing deference the judiciary affords agency actions. While both means of growth offend the founding principles of limited government and enumerated powers, the latter is of prime concern because expansion of administrative deference raises serious constitutional concerns. SLF writes to explain how the panel majority's view that the Service's decision to not exclude Petitioners' property from critical habitat is unreviewable is simply wrong.

SUMMARY OF ARGUMENT

"The availability of judicial review, is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally void." Louis L. Jaffe, *Judicial*

Control of Administrative Action 320 (Little, Brown 1965). The common law presumption of reviewability grew out of the constitutionally protected right to claim protection of the laws. *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (citing *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835)). Congress codified the presumption of reviewability when it enacted the Administrative Procedure Act (APA). 5 U.S.C. § 701 *et seq*. And this Court has "long applied . . . [a] strong presumption favoring judicial review of administrative action." *Mach Mining v. EEOC*, 135 S. Ct. 1645, 1653 (2015).

Two decades ago, this Court addressed that presumption in a case with striking similarity to the cases before the Court today, and held that the Service's determination to not exclude property from the critical habitat of two endangered fish was judicially reviewable. *Bennett v. Spear*, 520 U.S. 154, 172 (1997). More specifically, this Court held that the issue of whether the Service followed proper procedure and considered the economic impact of its decision to not exclude, or rather to include, property as critical habitat was judicially reviewable. *Id.*

Ignoring the presumption of reviewability, this Court's precedent, and basic separation of powers principles, the Fifth Circuit abdicated its responsibility to review the Service's consideration, or rather lack of consideration, of the economic impact of its decision to not exclude Petitioners' property from critical habitat. Reviewing executive branch actions is one of the most important roles the judiciary plays in our society. As

Justice Kagan recently explained in her opinion for a unanimous Court, this Court is reluctant to see an agency's compliance with the law rest in its hands alone because "[w]e need only know – and know that Congress knows – that legal lapses and violations occur, and especially so when they have no consequence." *Mach Mining*, 135 S. Ct. at 1652-53.

The implications of the Service's decisions to include or exclude property from critical habitats cannot be understated. Any argument by the Service that such decisions are judicially unreviewable indicates a belief that it is above the law and that the judiciary lacks the power to hold it accountable and review whether it followed legislatively (or even administratively) mandated procedures. And, in what can only be described as an abdication of responsibility, over a dissent and a six-member dissent from the denial of rehearing en banc, the Fifth Circuit deferred to the Service.

In addition to those opportunities discussed in the Petitions, this case provides this Court with the opportunity to hold not only the Service, but all agencies embarking on so-called discretionary activities, accountable to the People and the letter of the law.

ARGUMENT

I. Introduction.

A. The Service designates Unit 1 as critical habitat.

This case arises from the Service's determination to designate privately owned land in Louisiana as critical habitat for the endangered Mississippi dusky gopher frog. In 2001, the Service listed the gopher frog as endangered. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Nine years later, the Service proposed to designate 1,957 acres of largely public property in Mississippi as critical habitat. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31,389, 31,395-96 (June 3, 2010). Notably, at that time, the Service did not designate any property in Louisiana as critical habitat. Rather, it noted that "[a]t the time of listing in 2001, this species occurred at only one site, Glen's Pond, in the DeSoto National Forest in Harrison County, Mississippi." *Id.* at 31,388; *see also id.* at 31,389 ("Field surveys conducted in Alabama and Louisiana have been unsuccessful in documenting the continued existence of Mississippi gopher frogs in these States.").

The following year, the Service published a Revised Proposed Rule expanding the critical habitat designation to include over 1,500 acres of privately owned land in St. Tammany Parish, Louisiana (Unit 1). *See* Revised Proposed Rule for the Designation of Critical

Habitat for the Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,783 (Sept. 27, 2011). The Service did so despite its acknowledgement that not a single gopher frog could be found in Unit 1 and that to even get the frogs to Unit 1 in Louisiana, they would have to be "translocated" from Mississippi. *Id.* The Service also admitted that "[t]he uplands associated with the ponds [in Unit 1] do not currently contain the essential biological and physical features of critical habitat; however, we believe them to be restorable with reasonable effort." *Id.* Despite the lack of gopher frogs and the great effort it would take to make Unit 1 habitable for the gopher frogs, the Service declared Unit 1 "is proposed as critical habitat because it is essential for the conservation of the species." *Id.* 59,783.

In designating Unit 1 as critical habitat, the Service acknowledged that it could exclude an area from the designation if the benefits of exclusion outweigh the benefits of designation. *Id.* at 59,789. The Service pointed to a draft economic analysis, which addressed the economic impact of designation on several properties including Unit 1 and acknowledged that the land was privately owned, "managed for timber, [and] recently re-zoned for mixed-use and residential development." Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog (Economic Analysis) (2012), at 6.[2]

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[2] https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf.

In June 2012, the Service published its Final Rule, in which it acknowledged that it had "no existing agreements with the private landowners of [the Louisiana Property] to manage this site to improve habitat for the dusky gopher frog, or to move the frog there." Final Rule for the Designation of the Critical Habitat for the Dusky Gopher Frog (the Final Rule), 77 Fed. Reg. 35,118, 35,123 (June 12, 2012). Even so, it "hope[d] to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* However, none of the tools available to make those ponds potential habitats for the gopher frog, such as "prescribed burning, or frog translocations to the site, c[ould] be implemented without the cooperation and permission of the landowner." *Id.*

In addition, the Service addressed the economic impact of its critical habitat designation. Consistent with the draft economic analysis the Service evaluated three potential scenarios. The first, which would "avoid[] impacts to jurisdictional wetlands" and, thereby, avoid the need for Section 7 consultations between federal agencies, would not cost the landowner anything; rather, the costs would be "the administrative costs of future section 7 consultations in all other units." *Id.* at 35,140. The second assumed that a Section 404 permit from the U.S. Army Corps of Engineers would be required, and that 60% of the property would have to be "managed" for the frog's benefit. *Id.* at 35,140-41. The present cost of such a reservation to the landowners was estimated to be $20.4 million. Under

the third scenario, the Service would recommend no development "due to the importance of the unit in the conservation and recovery of the species." *Id.* at 35,141. In that case, the present cost of the Service's action to the landowners was estimated to be $33.9 million. *Id.*

For the benefits of designating Unit 1, the Service observed that it "believes that the benefits of the proposed rule are best expressed in biological terms." *Id.* at 35,127. Those benefits could not be "quantif[ied]" or "monetize[d]," so they could only be viewed "qualitative[ly]." *Id.* at 35,141. It concluded that the economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* Accordingly, it declined to exclude the Louisiana property from the critical habitat. *Id.*

B. The Fifth Circuit holds that the Service's decision to not exclude Unit 1 from critical habitat is judicially unreviewable.

Owners of property in Unit 1, Petitioners Markle Interests and Weyerhaeuser, filed suit challenging the Service's decision to not exclude Unit 1 from its designation of critical habitat on economic grounds as arbitrary and counter to the evidence before the Service. The district court ruled against Petitioners. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744 (E.D. La. 2014). Petitioners timely appealed the district court's ruling.

A split Fifth Circuit panel, with Judge Owen dissenting, refused to review the Service's decision to not

exclude Unit 1, holding the decision judicially unreviewable, even for an abuse of discretion. *Markle Interests*, 827 F.3d 452, 473 (5th Cir. 2016). The Fifth Circuit panel majority was notably quiet regarding the presumption of reviewability. Further, the panel majority sought to justify its abdication of responsibility by stating that it could not review the exclusion because there was "no meaningful standard against which to judge the agency's exercise of discretion."[3] *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). The panel majority explained that "even were [it] to assume that the Landowners are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

Subsequently, the Fifth Circuit denied rehearing en banc, with six members dissenting. *See generally*, *Markle Interests*, 848 F.3d 635 (5th Cir. 2017). The dissent disagreed with, among other things, the panel majority's conclusion of unreviewability. It pointed to the panel majority's failure to acknowledge this Court's decision in *Bennett v. Spear*, where it held that "the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary." *Id.* at 654 (Jones, J., dissenting). Indeed, while the panel majority "refer[red]" to *Bennett* at several points,

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[3] As Petitioners explain, abuse of discretion is a familiar standard of review and one which this Court has applied before. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 43 (1983).

it "never engaged *Bennett*'s clear signal that the Service's decision is reviewable." *Id.* Accordingly, "[r]egardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion." *Id.*

II. This Court should grant the Petitions because the Fifth Circuit erroneously held that the Service's designation of Unit 1 as critical habitat is judicially unreviewable.

A. Judicial review of administrative actions like the Service's decision to not exclude Unit 1 is presumed.

1. This Court's precedent antedating the APA supports judicial review of executive action. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall declared: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Id.* at 163. Inherent in the constitutionally protected right to claim protection of the laws is a strong presumption of judicial review. *See Bowen*, 476 U.S. at 670 (citing *Nourse*, 34 U.S. (9 Pet.) at 28-29).

Throughout history, the Court has emphasized the need for the judiciary to review executive actions. And, despite a period of judicial restraint that resulted only out of deference to Congress, by the early 20th Century, any perceived barriers to judicial review faded away.

See Am. School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902) (explaining that the acts of all administrative agency "officers must be justified by some law, and in the case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief"). The increased level of executive actions and the already growing administrative state underscored the need for judicial review. In 1915, the Court reaffirmed the common law presumption of reviewability when it reviewed the Acting Commissioner of Immigration's detention of a group of aliens for the purpose of deportation even though the statute at issue did not provide for judicial review. *Geigow v. Uhl*, 239 U.S. 3, 8 (1915). Writing for the Court, Justice Oliver Wendell Holmes explained that judicial review was appropriate because the statute did not forbid courts from considering whether the Commissioner's act violated the statute. *Id.* at 9. In doing so, Justice Holmes made clear that under the common law, unless a statute forbids judicial review, the courts have both the power and duty to review challenged executive actions.

Over the next few decades, the Court continued to stress the need for judicial review of administrative decisions. By way of example, in *Lane v. Hoglund*, 244 U.S. 174 (1917), the Court reviewed the actions of the Secretary of Interior taken under a homestead law. In doing so, the Court found judicial review of administrative acts both appropriate and necessary, explaining that to find otherwise would "limit[] the powers of the court" and "be most unfortunate, as it would relieve

from judicial supervision all executive officers in the performance of their duties." *Id.* at 182. And, in *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932), the Court reviewed the Secretary of Labor's imposition of fines against steamship companies for bringing aliens with illnesses into the United States. The Court explained that it had the power to review the administrative action because even though "Congress confer[red] on the Secretary great power, . . . it is not wholly uncontrolled." *Id.* at 339.

In 1944, the "powers of the court" to review executive actions that the Court so often spoke about received their greatest affirmation and explanation. In *Stark v. Wickard*, 321 U.S. 288 (1944), the Court explained that the presumption of reviewability arises from Article III of the United States Constitution because "[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Id.* at 310. The Court continued: "Under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Id.* Starting with the presumption of reviewability inherent in the Constitution, the Court reviewed the statute governing the Secretary of Agriculture's actions and, finding it silent as to judicial review, explained that "the silence of Congress as to judicial

review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Id.* at 309.

2. In 1946, Congress enacted the Administrative Procedure Act and codified "the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702). When determining whether administrative action like the Jurisdictional Determination is subject to judicial review, the Court demands that the APA's "generous review provisions . . . be given a hospitable interpretation." *Id.* at 141 (internal quotations and citations omitted). Both the Court and Congress have emphasized that "'very rarely do statutes withhold judicial review[]'" because to do so would convert statutes into "blank checks drawn to the credit of some administrative officer or board." *Bowen*, 476 U.S. at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

B. The Fifth Circuit's denial of judicial review conflicts with this Court's precedent.

In holding that the Service's decision to not exclude Unit 1 from designation as critical habitat is judicially unreviewable, the Fifth Circuit dismissed basic tenets of administrative law. As this Court explained

two decades ago when it found the Service's decision to not exclude land as critical habitat for fish listed as endangered in 1988 reviewable: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett*, 520 U.S. at 172 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943)).

Like the Service does here, in *Bennett*, the Service sought to avoid judicial review of the critical habitat designation at issue. 520 U.S. at 172. More specifically the Service contended that the Secretary's duty under 16 U.S.C. § 1533(b)(2) to "tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat" was discretionary and hence, unreviewable. *Id.* at 172. This Court rejected that argument, explaining that while the Service's ultimate decision regarding critical habitat designation "is reviewable only for abuse of discretion" the "categorical *requirement*" that the Service consider the economic impact of such a designation remains and as such, is reviewable.[4] *Id.* As Judge Jones

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[4] The Endangered Species Act (ESA) plainly requires the Secretary to consider the economic impact of the agency's actions. In pertinent part, 16 U.S.C. § 1533(b)(2) provides that, when designating critical habitat, the Secretary "shall" make any decision "on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." *Id.* In addition, it states that the Secretary "may exclude any area from critical habitat" when extinction of the species is not in issue by finding that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.*

noted in writing for the dissent, *Bennett* is a "clear signal that the Service's decision is reviewable." *Markle Interests*, 848 F.3d at 654.

Further, the panel majority's reliance on *Heckler v. Chaney*, 470 U.S. 821, was misplaced. While this Court held that the claim before it was not reviewable because it raised a question "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the nature of the agency action involved there is entirely different from the agency action involved in this case. It explained that "an agency's decision not to take enforcement action should be presumed immune from judicial review" [because it] has traditionally been "committed to agency discretion. . . ." *Heckler*, 470 U.S. at 832.

> Moreover, this Court observed that
>
> > [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

Id. (emphasis in original). Here, as is plain, the Service exercised its powers over Petitioners' property. That affirmative exercise, whether denominated an inclusion or the refusal to exclude, is an affirmative action that is reviewable for an abuse of discretion.

This case provides the Court with an opportunity to affirm its rejection of the Service's request to exempt its discretionary acts from the "required procedures of decisionmaking."

C. Denying judicial review of the Service's decision to not exclude Unit 1 violates separation of powers principles.

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities" *id.* at 1878, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . ." The Federalist No. 45 (James Madison), at 292 (Clinton Rossiter ed., 1961).

Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at

1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (citation and quotation omitted).

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Members of the Supreme Court warned that the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id.* at 594 (Frankfurter, J., concurring). The purpose of the separation of powers is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id.* at 629. As Justice Jackson stressed, any presidential claim to power "at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution." *Id.* at 638 (Jackson, J., concurring).

Under these principles, any action by which one branch of the federal government presumes to encroach upon the constitutionally assigned functions of another branch presents a fundamental threat to liberty. "In a government, where the liberties of the people are to be preserved . . . , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention of

May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787, p.108 (rev. ed. 1966). *See* The Federalist Nos. 47-51 (J. Madison) (explaining and defending the Constitution's structural design of separated powers). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). *See id.* at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

Preclusion not only conflicts with the presumption of reviewability founded in common law and codified in the APA, but it runs afoul of the Constitution. As this Court has explained, "a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse" than a judiciary that reviewed agency action. *Free Enter. Fund*, 130 S. Ct. at 3157 (internal quotation marks, alterations, and citations omitted). "The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) (majority opinion).

There are few actions by administrative agencies that exhibit the tyranny our Founding Fathers feared more than decisions by the Service not to exclude, or rather to include, land as critical habitat under the ESA. Congress could have never predicted the vast expansion of critical habitat and the egregious violations of the Fifth Amendment that the Service has pursued

since it enacted the ESA in 1973. The Service's latest attempt to expand critical habitat for the dusky gopher frog to include Unit 1 land owned by private parties which the Service itself admits is neither a current habitat or even a suitable habitat for the frog, underscores the need for judicial review.

CONCLUSION

For the foregoing reasons, and those stated by Petitioners in the Petition for Writ of Certiorari, *amicus* respectfully requests that this Court grant the writ of certiorari, and, on review, reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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RECORD AND BRIEF

Nos. 17-71, 17-74

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In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

MARKLE INTERESTS, LLC, ET AL.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ST. TAMMANY PARISH AS AMICUS CURIAE SUPPORTING WEYERHAEUSER PETITIONER

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INTEREST OF AMICUS CURIAE

St. Tammany Parish Government is a political subdivision of the State of Louisiana and the local governmental body that has exclusive zoning jurisdiction over the property that is at issue in this matter. The said property has previously been zoned for development as a Traditional Neighborhood and the designation as a "Critical Habitat" will adversely effect same. This brief has been authored solely by counsel for St. Tammany Parish Government and its undersigned counsel of record. No party contributed funding related to the preparation of this brief.[1]

SUMMARY OF ARGUMENT

St. Tammany Parish has a vested interest in the designation by the U.S. Fish and Wildlife Service of the parcel of land at issue consisting of one thousand five hundred forty-four (1,544) acres as "critical habitat" for the gopher frog. The designation effectively removes the property from commerce and adversely affects the Parish's development by its residents and businesses resulting in a reduced tax base hindering local government from meeting the needs of its growing population, which has been the primary refuge of thousands of people who fled their homes from the onslaught of

[1] In accordance with Rule 37.2, all counsel of record have been notified at least ten days prior to the filing of this brief. In accordance with Rule 37.4, no motion for leave to file an amicus curiae brief is necessary if presented on behalf of a county or similar entity when submitted by its authorized law officer.

Hurricane Katrina. The St. Tammany Parish Council officially opposed the said designation during the proposed rule-making process by the adoption of Resolution Council Series No. C-3274 on November 3, 2011.

The zoning authority for St. Tammany Parish dates back to the 1921 Louisiana Constitution, and said authority has been prudently exercised by its Parish Council in the adoption of a Comprehensive Zoning Plan. The property in question was in fact specifically zoned as a "Traditional Neighborhood Development Zoning District." Said district was created for the development of a sustainable, long-term community that provides economic opportunity along with environmental and social equality for its residents. It encourages a mixed use compact development that facilitates the efficient use of services.

The "critical habitat" designation removes said property from being developed and as such usurps the authority of the Parish as authorized by the State of Louisiana to manage growth by determining its highest and best use within the fastest growing Parish in the State of Louisiana.

Historically land use decisions are legally local matters and communities across our nation are disserved when federal agencies overreach to place land off limits when there is no compelling need to do so. Further, management of the proposed habitat to sustain the frogs would ultimately require that the existing forest be destroyed and the establishment of a longleaf pine forest, which would require in turn that

this new forest be maintained by the periodic burning of the property in order to stimulate the growth of new planted longleaf trees, which is essential to converting the existing ponds back into "ephemeral" ponds for frogs to even have a chance to survive at the said property. This maintenance procedure along the abutting Louisiana Highway 36 corridor, which is a critical east-west transportation route, will create serious public safety concerns both for local and interstate commerce traffic as well as resultant health hazards from the thick smoke clouds for the nearby community of Hickory.

Finally, the economic impact from the non-development will result in loss of revenue in the form of property taxes and sales taxes, which are an integral part of public funding for the operation and maintenance of the Parish's Criminal Justice system, school system, fire protection districts, public recreational facilities, roads, drainage, public health and hospitals.

St. Tammany Parish acknowledges that challenges faced by the U.S. Fish and Wildlife Service to protect endangered species. However, the rights of the residents of St. Tammany Parish and the landowners to determine the orderly growth of the Parish should be weighed heavily against an unwarranted attempt by the federal government to assert its excessive authority over the privately owned land where the frogs have not been seen in over fifty (50) years and the habitat no longer exists. President Thomas Jefferson's early warnings of federal overreach still ring true that

history demonstrates that "most bad government results from too much government."

ARGUMENT

A. Zoning In St. Tammany Parish

The zoning authority for St. Tammany Parish dates back to the 1921 Louisiana State Constitution. Over the years and through several forms of government, St. Tammany Parish has exercised said authority by adopting many zoning ordinances, starting first with the establishment of a subdivision regulatory committee to control the growth of the Parish. The Parish exploded from a sleepy rural agricultural community sprinkled with summer houses and small cities/towns to one of fast unprecedented growth when the twenty-four (24) mile long Lake Pontchartrain Causeway was constructed in 1956 interconnecting the City of New Orleans with the Parishes of Jefferson and St. Tammany.

Unfortunately, a very serious contributing factor to the sudden explosion was the devastation which fell upon the entire area, particularly the flooding of the City of New Orleans, by Hurricane Katrina in 2005. The Parish's population has grown by over thirty thousand (30,000) residents since Katrina. Housing became a critical issue, and St. Tammany Parish became essential in the entire surrounding areas' recoveries and in the future growth of the areas' economies.

The designation of the subject property in question for the hopeful preservation of the gopher frog at such a critical time in the history of not only the residents of St. Tammany but also the City of New Orleans and the entire southeast area of Louisiana will certainly have long lasting detrimental effects.

St. Tammany Parish is a home rule charter form of government adopted in 1998. Due to the change after Katrina, the Parish in 2007 passed Ordinance No. 07-1548, adopting a Unified Development Code (UDC) – Volume 1 (Zoning), which established a more stringent comprehensive rezoning process. Numerous public meetings/hearings were held throughout the Parish and before the St. Tammany Parish Zoning Commission and Parish Council, affording the public as well as property owners an opportunity to be heard on the zoning designation of all property in unincorporated St. Tammany. Finally, after a three (3) year process, Ordinance C. S. No. 10-2408 was adopted on December 2, 2010, which completed the comprehensive rezoning of the unincorporated areas of the Parish. The property that is the subject of the "critical habitat" designation by the U.S. Fish and Wildlife Service and which forms the basis of this litigation was included in said process and was zoned to be developed as a Traditional Neighborhood Development. President Grover Cleveland noted: "A government for the people must depend for its success on the intelligence, the morality, the justice, and the interest of the people themselves."

A "Traditional Neighborhood Development Zoning District" (TND-2) was established by said ordinance

for the property in question. The purpose of which is clearly stated in the ordinance:

> Section 5.3501A PURPOSE
>
> The purpose of a TND-2 Traditional Neighborhood Development Zoning District ("TND District") is to encourage mixed-Use, compact Development and facilitate the efficient use of services. A TND District diversifies and integrates land Uses within close proximity to each other, and it provides for the daily recreational and shopping needs of the residents. A TND District is a sustainable, long-term community that provides economic opportunity and environmental and social equity for the residents. This ordinance's intent is to encourage its use by providing incentives, rather than prohibiting conventional Development.

The location of the property was a major factor in the zoning process for its being located north of U.S. Interstate 12 (I-12). Said location of a traditional neighborhood removed its future residents and businesses out of harm's way in the inevitable event of the devastating effects from hurricanes including flooding.

Zoning's primary purpose by local elected officials is for the health, safety, and welfare of its constituents and said authority should not be usurped unreasonably and needlessly by a federal agency.

B. Environmental Impact

When one looks at what said "critical habitat" designation requires relative to the environmental effects to the residents of the area, it is very concerning. An examination of the requirements of what is needed to re-establish a viable habitat for the gopher frog is necessary.

First, the existing loblolly pine forest needs to be destroyed and the property replanted with a type of tree that is very slow growing, the longleaf pine. Second, the growth of the longleaf pine trees can only be stimulated by periodically burning the underbrush and scorching the bark of the trees and the earth to destroy any other vegetation. Third, the fires necessary for maintenance of a longleaf pine forest have created in the past, and will create in the future, hazards to the local traffic and interstate commerce along both Louisiana Highway 36 and U.S. Interstate 12 (I-12). The most concerning is the potential adverse health effects of the burning of one thousand five hundred forty-four (1,544) acres on the local residents of the community of Hickory.

Finally, the potential for disaster exists if the required fires turn into wildfires and spread to said community which is serviced by a rural fire district with limited equipment and manpower.

One of the primary reasons longleaf pine forests, except in designated conservation areas in St. Tammany Parish, are almost nonexistent is because of the adverse environmental effects on its citizens from the

fire. Further complicating the situation are the federal ozone pollution standards which must be met, thereby requiring the preparation of an Environmental Impact Statement in this matter.

Despite the important and critical issues involved in the case *sub judice*, no environmental impact statement was performed in the decision-making process, which should be required in order to protect the environment and the citizens of St. Tammany.

C. Economic Impact

St. Tammany Parish has a mixed tax base utilizing property taxes, impact fees, sales and use taxes, and parcel fees. The current tax structure supports the Parish's Criminal Justice System, school system, fire protection districts, public recreational facilities, roads, drainage, public health, and hospitals. As growth and new development occurs, the economy of the Parish grows with its existing tax structure.

Prior to Hurricane Katrina, the Parish was controlling and meeting the needs of its existing residents by providing the appropriate road infrastructure and essential services. Post Katrina, the aging infrastructure of the Parish has suffered and essential services can only be maintained by the continuation of the growth and economy.

Part of this responsibility is carried by developments under the Traditional Neighborhood concept such as the zoning designation of the property in

question. Developers will be required to provide the essential services concomitant with the expanding Parish infrastructure while at the same time providing a tax base for the generation of taxes to support the management of those services. The non-development of the site in question does not present itself as a viable option to the Parish and was one of the factors in its adopting Resolution Council Series No. C-3274 in opposition to the "critical habitat" designation by the U.S. Fish and Wildlife Service. The Parish's use of the term "Mississippi" in describing the frog was deliberate because the frog has not had a habitat and has not dwelled in Louisiana for over half a century.

CONCLUSION

When reasonable people balance the rights of citizens to develop the areas they reside in utilizing an orderly legal process to preserve and enhance their health, safety, and welfare against the intrusion of a federal agency's grasp at the minimalistic traits of a particular piece of property in a vain attempt to save a frog that has not been sited thereon in over half a century, only one conclusion can be reached. That conclusion is the reversal of the prior decision of the

Courts and a return of government to one of "We The People!"

Respectfully submitted,

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RECORD AND BRIEFS

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On Petitions for Writs of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Endanger Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether federal law precludes courts from reviewing an agency decision not to exclude a tract from critical habitat pursuant to 16 U.S.C. § 1533(b)(2), where the agency bases its decision on a determination that the cost of designation (measured in terms of lost development value for the tract) is not disproportionate to "biological" benefits of designation.

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INTERESTS OF *AMICI CURIAE*

Washington Legal Foundation (WLF) is a nonprofit public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared before this Court as well as other federal courts to urge adoption of environmental policies that strike an appropriate balance between environmental safety and economic well-being. *See, e.g. Murray Energy Corp. v. EPA*, No. 15-3751 (dec. pending, 6th Cir.) (defining "Waters of the United States" under Clean Water Act); *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427 (2014) (challenge to EPA's Clean Air Act "tailoring rule"). In particular, WLF has participated in virtually every major case that has come before this Court regarding the scope of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* *See, e.g., Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of their intent to file. All parties have consented to the filing.

in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions, including in *Nat'l Assoc. of Home Builders.*

Amici agree with Petitioners that review is warranted on each of the Questions Presented in Nos. 17-71 and 17-74. *Amici* write separately to focus on the second question raised by Petitioner Weyerhaeuser: whether Congress intended to preclude all judicial review of decisions of the U.S. Fish and Wildlife Service (FWS) not to exclude areas from an ESA "critical habitat" designation.

As Judge Edith Jones concluded in her dissent from denial of rehearing *en banc* (joined by five other Fifth Circuit judges), the panel's holding that FWS no-exclusion decisions are not subject to judicial review "play[s] havoc with administrative law." Pet. App. 156a.[2] *Amici* are concerned that if that holding is allowed to stand, it will provide federal agencies with unilateral power to make a broad array of regulatory decisions, unchecked by any possibility of judicial review. *Amici* do not believe that the decision below is consistent with this Court's repeated and longstanding application of a "strong presumption" favoring judicial review of administrative action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

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[2] When citing decisions below, *amici* reference the Petition Appendix in No. 17-71.

STATEMENT OF THE CASE

Once a plant or animal species has been listed as "endangered," the Endangered Species Act generally requires FWS (or, in appropriate cases, the National Oceanic and Atmospheric Administration) to designate "critical habitat" for the species. 16 U.S.C. § 1533(a)(3)(A). With respect to areas not "occupied" by the species at the time of its listing, such areas may not be designated as critical habitat except "upon a determination by the Secretary that such areas are *essential* for the conservation of the species." § 1532(5)(A)(ii) (emphasis added).

The ESA states that such designations "shall" be made "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." § 1533(b)(2). In determining the scope of the designated area:

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such areas as critical habitat will result in the extinction of the species concerned.

Ibid.

In 2001, FWS listed the Mississippi gopher frog (a species of frog currently found only in Mississippi) as an endangered species.[3] In 2011, FWS published a proposed rule that would have designated certain areas in Mississippi (but not elsewhere) as critical habitat for the species. Pet. App. 86a. In response to peer-review comments that the designated areas were insufficient for conservation of the species, FWS amended the proposed rule to include an area in Louisiana (referred to as "Unit 1") within the designation. *Id.* at 87a.

In its 2012 final rule, FWS continued to include Unit 1 (consisting of 1,544 acres of forested land not currently occupied by the dusky gopher frog) in the area designated as critical habitat. 77 Fed. Reg. 35,118 (June 12, 2012). Petitioners (collectively, "Weyerhaeuser") own the land included in Unit 1. They filed suit in district court in 2013, challenging the "critical habitat" designation. Among their claims: FWS's designation was arbitrary, capricious, and an abuse of discretion—in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A)—because FWS failed to exclude Unit 1 from the designation, even though the costs of inclusion vastly exceeded the benefits (if any) of inclusion.

The district court granted FWS's motion for summary judgment and dismissed the complaint. Pet. App. 78a-122a. The court conceded that Petitioners' challenge to FWS's economic analysis was their "most

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[3] FWS renamed the species the "dusky gopher frog" in 2012, at about the same time that it began contemplating designating areas outside of Mississippi as "critical habitat" for the species.

compelling issue," and it labeled "most troubling" FWS's "conclusion that the economic impacts on Unit 1 are not disproportionate." *Id.* at 113a-114a. It ultimately concluded, however, that the ESA required it to defer to FWS's decision to include Unit 1 within the critical habitat designation. *Id.* at 118a.

A divided Fifth Circuit panel affirmed. Pet. App. 1a-77a. The panel majority devoted most of its opinion to explaining its conclusion that FWS acted reasonably in determining that: (1) designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog; and (2) Unit 1 is essential for the conservation of the frog. *Id.* at 15a-32a. It then declined to review Weyerhaeuser's claim that Unit 1 should have been excluded from the critical-habitat designation on the basis of the designation's economic costs. *Id.* at 32a-36a. It concluded that FWS decisions not to exclude areas from such designation are "decisions 'committed to agency discretion by law'" and thus "are not reviewable in federal court." *Id.* at 33a (quoting 5 U.S.C. § 701(a)(2)). To support its conclusion that Congress intended to preclude judicial review of FWS decisions not to exclude areas on the basis of economic considerations, the panel cited the word "may" in the second sentence of 16 U.S.C. § 1533(b)(2). *Ibid.*[4]

Judge Owen dissented. Pet. App. 48a-77a. She concluded that the ESA precluded inclusion of Unit 1

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[4] The cited sentence states, in part, that FWS "*may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." § 1533(b)(2) (emphasis added).

in the critical-habitat designation because: (1) the area's "biological and physical characteristics will not support a dusky gopher frog population"; and (2) there is no evidence that it will become "essential" to the conservation of the species because "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." *Id.* at 48a. In light of her conclusion, Judge Owen did not address the majority's holding that FWS's no-exclusion determination was not subject to judicial review.

In February 2017, the Fifth Circuit voted 8-6 to deny Weyerhaeuser's petition for rehearing *en banc*. Pet. App. 124a. Judge Jones issued an opinion (joined by five other judges) dissenting from the denial. *Id.* at 124a-162a.

Among the reasons cited by Judge Jones for granting rehearing was her conclusion that "[t]he panel majority play havoc with administrative law by declaring the Service's decision not to exclude Unit 1 non-judicially reviewable." *Id.* at 156a. She faulted the panel for "never recognizing or applying" the "strong presumption favoring judicial review of administrative action," a presumption that "is not easily overcome." *Id.* at 160a. She argued that the panel decision directly conflicts with this Court's decision in *Bennett v. Spear*, that FWS *must* take economic considerations into account in making critical habitat decisions, and that "its ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion." *Id.* at 161a (citing *Bennett*, 520 U.S. at 172). She concluded, "The panel majority's refusal to conduct judicial review

is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action." *Id.* at 162a.

SUMMARY OF ARGUMENT

The Petitions raise issues of exceptional importance. In particular, the Fifth Circuit's determination that Congress intended to preclude all review of FWS no-exclusion decisions conflicts sharply with this Court's case law, which creates a strong presumption of judicial review of administrative action.

The Fifth Circuit held that Congress barred courts from reviewing an FWS determination to proceed with a "critical habitat" designation in the face of landowner objections that designation would impose unwarranted economic costs. Pet. App. 32a-36a. Any such congressional edict would represent an extraordinary departure from the manner in which Congress is normally presumed to legislate. That is so because "[a]bsent [judicial] review, [an agency's] compliance with the law would rest in the [agency's] hands alone." *Mach Mining, LLC v. EEOC*, 135 S Ct. 1645, 1652 (2015). The Court explained:

> We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action.

Id. at 1652-53.

The Fifth Circuit based its determination to bar judicial review of FWS cost-benefit determinations on Congress use of the word "may" rather than "shall" in the second sentence of § 1533(b)(2). That single word cannot possibly bear the weight imposed on it by FWS and the Fifth Circuit—particularly because the previous sentence in § 1533(b)(2) states that FWS, when making critical-habitat determinations, "shall" take into consideration "the economic impact ... of specifying any particular area as critical habitat." There could have been only one purpose in requiring consideration of economic impact: to prevent an area from being designated as critical habitat when the costs of doing so outweigh the benefits.

FWS may be entitled to considerable leeway in how it goes about weighing costs and benefits. But nothing in the ESA suggests that courts are precluded from reviewing FWS's ultimate determination under an abuse-of-discretion standard. Indeed, the Court in *Bennett* explicitly held that ESA critical-habitat designations were subject to judicial review based on claims that FWS failed to properly consider the "economic impact" of the designations. *Bennett*, 520 U.S. at 172. Review is warranted to resolve the conflict between *Bennett* and the Fifth Circuit's contrary holding.

In concluding that FWS no-exclusion determinations are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the Fifth Circuit relied on this Court's decision in *Heckler v. Cheney*, 470 U.S. 821 (1985). Pet. App. 33a. That reliance was misplaced. *Heckler* held that, in general, the decision by a federal enforcement agency not to bring an enforcement action

is not subject to judicial review, primarily because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." 470 U.S. at 831. The Fifth Circuit sought to analogize FWS's decision not to exclude a particular area from critical habitat to an agency's decision not to bring an enforcement action. That analogy makes little sense. Any FWS decision not to exclude a particular area from critical habitat is, by definition, a decision to *include* the area in the designation—thereby subjecting the area to burdensome government regulation.

Nor can FWS realistically argue that a reviewing court would have no meaningful standard against which to judge FWS's exercise of discretion. Indeed, the Service readily concedes that point when the shoe is on the other foot. When an environmental group objects to an FWS decision to *exclude* particular areas from a critical-habitat designation on the basis of the second sentence of § 1533(b)(2), the agency decision is subject to review under an abuse-of-discretion standard. If a reviewing court has meaningful standards against which to judge an FWS decision to exclude a particular area based on a cost-benefit analysis, then it likewise has meaningful standards against which to judge an FWS no-exclusion decision.

The Fifth Circuit's decision to bar judicial review is particularly troubling because the evidence overwhelmingly supports Petitioners' contention that FWS was unable to identify *any* benefits of Unit 1 critical-habitat designation that would offset the admittedly severe economic burdens imposed on

landowners by that designation.[5] FWS's April 6, 2012 "Economic Analysis" did not identify any benefits, other than that land-use restrictions imposed as a result of the designation might preserve open space and thereby "increase adjacent or nearby property values." That "benefit" does not, of course, do anything to assist the dusky gopher frog or any other endangered species for whose benefit Congress adopted the ESA.

Given § 1533(b)(2)'s mandate that FWS consider economic impact when designating critical habitat, at some point the imbalance between costs and benefits becomes so great that the only rational decision is to exclude the area in question. As the Court recently explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Yet, under the Fifth Circuit's ruling, courts are not permitted to review FWS's cost-benefit determination, no matter how irrational.

The circumstances surrounding adoption of § 1533(b)(2) also strongly support Weyerhaeuser's view that Congress intended to permit judicial review of FWS cost-benefit determinations. Congress added § 1533(b)(2), including its "economic impact" and

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[5] It is difficult to imagine how the designation could be of any benefit to the dusky gopher frog, given that the frog cannot be introduced into Unit 1 without the permission of landowners (permission they have said they will not grant) and given that (as FWS concedes) Unit 1 is not currently habitable for the dusky gopher frog and could not become habitable unless landowners agreed to substantial alterations of the property.

power-to-exclude language, in 1978, in response to the Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978). *TVA* upheld an ESA injunction against completion of the almost-finished Tellico Dam because (some feared) it might eradicate an endangered fish, the snail darter—even though abandonment of the dam would have huge economic consequences. The principal purpose of the 1978 amendments was to ensure that the ESA would not be applied in an economically irrational manner. There is little reason to believe that a Congress intent on injecting economic rationality into ESA decision-making simultaneously barred courts from hearing claims that FWS acted irrationally in making a critical-habitat designation.

Finally, review is also warranted because the decision below represents a serious erosion of the authority of federal courts to review federal administrative action. The APA authorizes judicial review of any "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, except to the extent that "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). By invoking the "committed to agency discretion by law" exception as the basis for precluding review of all FWS no-exclusion decisions—based on nothing more than inclusion of the word "may" in a statute—the Fifth Circuit has upended the traditional strong presumption favoring judicial review. Unless the appeals court decision is overturned, the federal government can be expected to continue to press its constricted views regarding the scope of judicial review of agency action. Indeed, FWS (and other agencies that administer the ESA) have memorialized their misinterpretation of § 1533(b)(2) in

formal regulations and guidance documents. *See, e.g.*, 50 C.F.R. § 424.19.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THE COURT'S APA CASE LAW

Subject to very limited exceptions, the APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Court has long recognized a "strong presumption" that the actions of federal agencies are subject to judicial review. *Bowen*, 476 U.S. at 670. As the Court recently explained:

> Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a "strong presumption" favoring judicial review of administrative action.

Mach Mining, 135 S. Ct. at 1651 (citations omitted).

The Fifth Circuit's determination that Congress intended to preclude review of FWS's decision not to exclude Unit 1 from the critical-habitat designation (*i.e.*, its decision to include Unit 1) conflicts sharply with this Court's strong-presumption case law. Review is warranted to resolve that conflict.

A. The Decision Below Misapplies the "Committed to Agency Discretion" Exception to Judicial Review of Administrative Action

The Fifth Circuit did not contend that any federal law explicitly precludes judicial review of an agency's decision to designate ESA critical habitat. Rather, the appeals court based its no-judicial-review determination on 5 U.S.C. § 701(a)(2), which bars review when "agency action is committed to agency discretion by law." Pet. App. 33a. It concluded that Congress precluded review in this instance because there are "no meaningful standards against which to judge the agency's exercise of discretion." *Ibid* (quoting *Heckler*, 470 U.S. at 830).

The appeals court premised its invocation of § 701(a)(2) on a misunderstanding of that statute that squarely conflicts with this Court's case law. *Amici* note initially that the panel neither recognized nor applied the strong presumption favoring judicial review. Proper application of the presumption requires a court to interpret arguably ambiguous statutes as *not* providing agencies with unreviewable discretion. *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) ("We recognize the 'strong presumption' in favor of judicial review that we apply when we interpret statutes, including statutes that may limit or preclude review.") An agency claiming that its actions are unreviewable "bears a heavy burden in attempting to show that Congress prohibited all judicial review." *Mach Mining*, 135 S. Ct. at 1651. Yet, the decision below includes no indication that the panel imposed any evidentiary burden on FWS or even

considered interpreting statutory ambiguities in favor of permitting judicial review.

More importantly, the Fifth Circuit's reliance on *Heckler* was wholly misplaced. Properly understood, *Heckler* directly conflicts with the decision below. *Heckler* was premised on the understanding that Congress rarely provides guidelines for reviewing the propriety of an agency's decision not to initiate an enforcement action. For that reason, *Heckler* stated, "the presumption is that judicial review is *not* available" for a decision not to initiate enforcement action. 470 U.S. at 831 (emphasis added). The Court explained:

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. ... The reasons for this general unsuitability [for judicial review of agency decisions to refuse enforcement] are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.

Ibid.[6]

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[6] *Heckler* held that § 701(a)(2) precluded judicial review of prison inmates' suit to compel the Food and Drug Administration to take enforcement action against several States' use of lethal-injection drugs that had not been approved by FDA as "safe and

The Fifth Circuit sought to analogize FWS's decision not to exclude a particular area from critical habitat to *Heckler*'s analysis of an agency's decision not to bring an enforcement action. Pet. App. 33a. That analogy makes little sense. Any FWS decision not to exclude a particular area from critical habitat is, by definition, a decision to *include* the area in the designation—thereby subjecting the area to burdensome government regulation. Section 1533(b)(2) sets forth a list a factors (including "economic impact") that FWS *must* take into account when designating critical habitat. Accordingly, the Fifth Circuit's conclusion that § 1533(b)(2) provides "no meaningful standard against which to judge [FWS's] exercise of discretion" in designating critical habitat, *ibid*, is implausible and conflicts sharply with *Heckler* and other decisions of this Court regarding the meaning of § 701(a)(2).

Moreover, the Fifth Circuit's position on this issue is inconsistent. The Court agreed with a Ninth Circuit decision that the FWS's invocation of § 1533(b)(2)'s second sentence to *exclude* a particular area from critical-habitat designation based on a cost-benefit analysis would be subject to judicial review. Pet. App. 35a (citing with approval *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015)). If the ESA provides sufficient "meaningful standard[s] against which to judge [FWS's] exercise of discretion" in excluding an area from a critical-habitat designation for cost-benefit reasons, then logically there also must be sufficient standards by which a court could judge

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effective" for human use. *Id.* at 837-38.

FWS's decision to *include* the same area.

That § 1533(b)(2) states that FWS "may" exclude an area from a critical-habitat designation for cost-benefit reasons does not suggest that FWS possesses absolute discretion not to exclude the area, even when inclusion would be economically irrational. Neither FWS nor the Fifth Circuit has cited any other statute that has been interpreted, based solely on inclusion of the word "may," as precluding judicial review of an agency decision not to desist from undertaking administrative action. Indeed, the Fifth Circuit's interpretation of the word "may" directly conflicts with decisions from the D.C. Circuit, which has held that a statute is not made unreviewable by the use of permissive language alone. *See, e.g., Dickson v. Secretary of Defense*, 68 F.3d 1396, 1401-02 & n.7 (D.C. Cir. 1995) (use of "may" suggests that "Congress intends to confer some discretion on the agency," not that "the matter is committed exclusively to agency discretion"; statute stating that Army "may" excuse an untimely filing does not confer unreviewable discretion not to do so).

B. The Decision Below Was Premised on a Basic Misunderstanding of the Endangered Species Act

The Fifth Circuit's no-judicial-review determination was colored by its (and FWS's) basic misunderstanding of the ESA and of § 1533(b)(2) in particular. Properly understood, the ESA requires FWS to take cost-benefit considerations into account with respect to *every* critical-habitat designation. While the statute affords FWS considerable discretion

in determining how much weight to afford cost-benefit considerations in its designation decision, nothing in the ESA suggests that courts are precluded from reviewing FWS's ultimate determination under an abuse-of-discretion standard. FWS and the Fifth Circuit interpret the statute differently; as they read it: (1) the initial decision to designate critical habitat should be based solely on the survival needs of the endangered species; (2) FWS must then analyze all the factors (including "economic impact") listed in the first sentence of § 1533(b)(2); and (3) FWS may, in its unreviewable discretion, decide to exclude areas if it concludes that the benefits of exclusion outweigh the benefits of inclusion, as set forth in the second sentence of § 1533(b)(2). *See, e.g.*, Pet. App. 15a-32a, 32a-36a; 50 C.F.R. § 424.19 (FWS regulation stating that Secretary shall "consider the probable economic and other impacts of the designation" only after initially proposing that an area be designated). That interpretation is wholly implausible. Because that erroneous interpretation is being applied to many millions of acres of land throughout the United States, review of the decision below is particularly warranted.

Congress mandated that determinations regarding the designation of land as critical habitat are to be made solely on the basis of factors set forth in § 1533(b)(2). Determinations "shall" be made:

> [O]n the basis of the best scientific evidence available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.

Nothing in § 1533(b)(2) suggests, as FWS urges and the Fifth Circuit held, that the initial designation may be based solely on the needs of the endangered species—such as a determination regarding whether designation of uninhabited lands is "essential" for the conservation of the species.

Nor does FWS satisfy its statutory obligations to designate critical habitat "after taking into consideration ... economic impact" (among other factors) by undertaking a *study* of economic impact. There is only one plausible explanation for why Congress would *require* consideration of the economic impact of designating particular areas as critical habitat: it was directing FWS to exclude areas whenever the study of economic impact led FWS to conclude that exclusion was warranted because the costs of designation exceeded its benefits.

Indeed, that is precisely what the second sentence of § 1533(b)(2) says. The second sentence imposes only one limitation on FWS's authority to exclude an area on the basis of cost-benefit considerations: it *may not* exclude the area if "failure to designate such area as a critical habitat will result in extinction of the species concerned." FWS and the Fifth Circuit improperly read the two sentences of § 1533(b)(2) as though they address wholly separate topics: (1) requiring the agency to conduct a study of economic impact; and (2) granting FWS the option, on the basis of the study and at its unreviewable discretion, to exclude areas. But properly read, the second sentence simply provides further guidance to FWS regarding how to carry out the designation obligations imposed on it by the first sentence.

Accordingly, nothing in the language of § 1533(b)(2) rebuts the "strong presumption" that Congress intended to permit judicial review of critical-habitat designations, including review of FWS determinations that cost-benefit considerations do not warrant exclusion of particular areas from that designation.

The circumstances surrounding adoption of § 1533(b)(2) also strongly support Weyerhaeuser's view that Congress intended to permit judicial review of FWS cost-benefit determinations. Congress added § 1533(b)(2), including its "economic impact" and power-to-exclude language, in 1978, in response to the Court's decision in *TVA v. Hill*. ESA Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978). *TVA* upheld an ESA injunction against completion of the almost-finished Tellico Dam because (some feared) it might eradicate an endangered fish, the snail darter—even though abandonment of the dam would have huge economic consequences. The principal purpose of the 1978 amendments was to ensure that the ESA was not applied in an economically irrational manner. *See* Damien Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas from Critical Habitat Should Be Reviewable under the APA*, 47 Envtl. L. Rep. 10352, 10354-55 (2017). There is little reason to believe that a Congress intent on injecting economic rationality into ESA decision-making simultaneously barred courts from hearing claims that FWS acted irrationally in making a critical-habitat designation.

C. The Decision Below Directly Conflicts with this Court's Holding in *Bennett*

In concluding that 5 U.S.C. § 701(a)(2) bars judicial review of FWS's no-exclusion decision, the Fifth Circuit made no mention of this Court's decision in *Bennett v. Spears*. Pet. App. 32a-36a. Yet, *Bennett* addressed this precise issue and concluded that FWS economic-impact decisions were judicially reviewable under the APA. Review by this Court is warranted to resolve the conflict between *Bennett* and the decision below.

At issue in *Bennett* was an FWS Biological Opinion that concluded: (1) long-term operation of the Klamath Irrigation Project was likely to jeopardize two endangered species of fish; and (2) a reasonable and prudent measure to avoid that jeopardy was to require the maintenance of minimum water levels on certain reservoirs (thereby reducing the amount of water available for irrigation). The plaintiffs sought judicial review of the Biological Opinion, asserting that: (1) it implicitly designated critical habitat for the endangered fish; and (2) that designation violated § 1533(b)(2) because it was undertaken without "tak[ing] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." *Bennett*, 520 U.S. at 172.

The government sought dismissal of the claim by asserting that, under § 1533(b)(2), FWS possessed unreviewable discretion in deciding whether to exclude particular areas from a critical-habitat designation based on economic-impact considerations. The Court

rejected that assertion, stating, "the terms of § 1533(b)(2) are plainly those of obligation rather than discretion." *Ibid.* The Court stated that use of the word "may" in the second sentence of § 1533(b)(2) did not alter its conclusion that courts were authorized to review—under an abuse of discretion standard—FWS's ultimate decision regarding whether to exclude particular areas from a critical-habitat designation based on cost-benefit considerations. *Ibid.*

Judge Jones's dissent from denial of rehearing *en banc* highlighted the clear conflict between *Bennett* and the panel decision. Pet. App. 160a-161a. Neither the panel nor the judges voting to deny rehearing challenged her conclusion that *Bennett*'s holding authorizes judicial review under the circumstances of this case. Review is warranted to resolve the conflict.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW PRECLUDES REVIEW OF ECONOMICALLY IRRATIONAL DECISION-MAKING

The Fifth Circuit's decision to bar judicial review is particularly troubling because the evidence overwhelmingly supports Petitioners' contention that FWS was unable to identify *any* benefits of Unit 1 critical-habitat designation that would offset the admittedly severe economic burdens imposed on landowners by that designation.[7]

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[7] As explained *supra* at 10 n.5, the designation of Unit 1 as "critical habitat" cannot possibly provide *any* benefit to the dusky gopher frog, at least for the foreseeable future..

An economic analysis commissioned by EPA concluded that the designation of Unit 1 could decrease the value of that property by as much as $34 million. The same analysis identified *no* benefits that the designation would provide to the dusky gopher frog. IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog* (Apr. 6, 2012) at 5-1 to 5-3.

In its final rule, FWS nonetheless concluded, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35,141. FWS did not explain what it meant by the word "disproportionate" or how it arrived at its no-disproportionate-costs conclusion. But one can reasonably question the rationality of that decision, given that the ratio of costs to benefits in this instance is infinite.

Given § 1533(b)(2)'s mandate that FWS consider economic impact when designating critical habitat, at some point the imbalance between costs and benefits becomes so great that the only rational decision is to exclude the area in question. As the Court recently explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Yet, under the Fifth Circuit's ruling, courts are not permitted to review FWS's cost-benefit determination, no matter how irrational, and even if there is no benefit at all.

The Fifth Circuit sought to distinguish *Michigan*, noting that the defendant in that case (EPA) had explicitly declined to consider costs before imposing new Clean Air Act (CAA) regulations (despite a statutory requirement to consider whether the regulation was "appropriate and necessary"), while FWS *did* "tak[e] into consideration" economic impact before designating Unit 1. Pet. App. 36a. But surely, § 1533(b)(2)'s "taking into consideration" requirement mandates more than simply adding up potential costs. It also mandates an analysis of whether designation is warranted in light of those costs and the complete absence of benefits—an analysis that FWS (all evidence suggests) never undertook. More importantly, nothing in § 1533(b)(2) indicates that courts are barred from reviewing Petitioner's claim that FWS failed to take economic impact into consideration when deciding not to exclude Unit 1.

III. THE DECISION BELOW SERIOUS ERODES THE AUTHORITY OF FEDERAL COURTS TO REVIEW FEDERAL ADMINISTRATIVE ACTION

Review of the Fifth Circuit's decision is particularly warranted because it represents a frontal assault on the presumption of reviewability of agency action. Numerous federal statutes use permissive language when describing the authority of agencies to act or not act. If mere use of the word "may" in a statute is to be viewed as a signal that an agency's decision not to desist from enforcement action is not reviewable, then little will be left of the "strong presumption" of reviewability.

In particular, the immigration laws are replete

with discretionary language regarding the federal government's authority to desist from removing an alien who is present in the United States without authorization. *See, e.g.*, 8 U.S.C. § 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures [they] establish[ ]") (emphasis added). If the decision below is allowed to stand, the rights of large numbers of aliens to contest their removal in federal court could reasonably be called into question.

Nor is there anything unique about FWS's contention in this case that its no-exclusion decision is unreviewable. Indeed, FWS has espoused this interpretation of § 1533(b)(2) for at least nine years. *See* Solicitor, Department of Interior, *The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the ESA* (Oct. 2008).[8] Unless review is granted, FWS will continue to urge courts to adopt the same unwarranted interpretation of § 1533(b)(2) adopted by the Fifth Circuit.

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[8]Given the "strong presumption" of reviewability of administrative action that courts employ when construing federal statutes, FWS's restrictive interpretation of § 1533(b)(2) is not entitled to deference from the courts.

CONCLUSION

The Court should grant the Petitions.

Respectfully submitted,

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August 14, 2017

No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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U.S. DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

Weyerhaeuser Company v. United States Fish and Wildlife Service et al.

No. 2:13-cv-00413-MLCF-SS

DATE	NO.	DESCRIPTION
03/04/2013	1	COMPLAINT against All Defendants filed by Weyerhaeuser Company.
03/05/2013	3	NOTICE by Weyerhaeuser Company of related cases: 13-cv-00234; 13-cv-00362.
04/30/2013	10	MOTION to Consolidate Cases by Weyerhaeuser Company.
05/02/2013	11	ORDER granting Motion to Consolidate Cases.
05/02/2013	12	ORDER that 13-0413 is consolidated with 13-0234.

DATE	NO.	DESCRIPTION
08/27/2014	13	JUDGMENT entered in favor of plaintiff Weyerhaeuser Co. and against defendants U.S. Fish & Wildlife Service as plaintiffs having standing and in favor of defendants U.S. Fish & Wildlife Service, Daniel M. Ashe, U.S. Department of the Interior and Kenneth Salazar and against plaintiffs Weyerhaeuser Company insofar as the Rule including Unit 1 in its critical habitat designation is not arbitrary.
08/28/2014	15	NOTICE OF APPEAL by Weyerhaeuser Company.

Relevant Docket Entries

U.S. DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

Markle Interests, LLC v. United States Fish & Wildlife Service et al.

No. 2:13-cv-00234-MLCF

DATE	NO.	DESCRIPTION
02/07/2013	1	COMPLAINT filed by Markle Interests, LLC.
04/25/2013	22	MOTION to Intervene by Center for Biological Diversity, Gulf Restoration Network.
05/02/2013	31	ORDER that 13-0234 is consolidated with 13-0362 and 13-0413.
05/20/2013	39	ANSWER to Complaint by Daniel M. Ashe, Sally Jewell, U.S. Department of the Interior, United States Fish & Wildlife Service (13-413).
05/28/2013	41	RESPONSE/MEMORANDUM in Opposition filed by Markle Interests, LLC to Motion to Intervene.
05/28/2013	42	RESPONSE/MEMORANDUM in Opposition filed by Weyerhaeuser Company to Motion to Intervene.

DATE	NO.	DESCRIPTION
06/10/2013	44	REPLY by Center for Biological Diversity, Gulf Restoration Network in support of Motion to Intervene.
07/22/2013	52	ORDER granting Center for Biological Diversity and Gulf Restoration Network's Motion to Intervene as Defendants.
07/22/2013	54	ANSWER to Complaint of Weyerhaeuser Company by Center for Biological Diversity, Gulf Restoration Network.
08/19/2013	60	NOTICE by United States Lodging the Administrative Record.
12/09/2013	67	MOTION for Summary Judgment by Weyerhaeuser Company.
12/09/2013	69	MOTION for Summary Judgment by Markle Interests, LLC.
02/21/2014	89	CROSS MOTION for Summary Judgment by United States (13-234).
02/21/2014	90	CROSS MOTION for Summary Judgment by United States (13-362).
02/21/2014	91	CROSS MOTION for Summary Judgment by United States (13-413).

DATE	NO.	DESCRIPTION
03/10/2014	93	CROSS MOTION for Summary Judgment by Center for Biological Diversity, Gulf Restoration Network (13-234).
03/10/2014	94	CROSS MOTION for Summary Judgment by Center for Biological Diversity, Gulf Restoration Network (13-413).
03/10/2014	95	CROSS MOTION for Summary Judgment by Center for Biological Diversity, Gulf Restoration Network (13-362).
05/01/2014	105	RESPONSE/MEMORANDUM in Opposition filed by Markle Interests, LLC re Cross Motion for Summary Judgment (13-234).
05/02/2014	106	RESPONSE/MEMORANDUM in Opposition to Cross Motion for Summary Judgment filed by Weyerhaeuser Company (13-234).
05/02/2014	107	RESPONSE/MEMORANDUM in Opposition to Cross Motion for Summary Judgment filed by P&F Lumber Company 2000, LLC, PF Monroe Properties, L.L.C., St. Tammany Land Company, L.L.C. (13-362).
06/16/2014	115	REPLY in support of Cross Motion for Summary

DATE	NO.	DESCRIPTION
		Judgment filed by United States (13-234).
06/16/2014	116	REPLY to Response to Motion filed by United States (13-362).
06/16/2014	117	REPLY to Response to Motion filed by United States (13-413).
06/30/2014	120	REPLY in support of Cross Motion for Summary Judgment filed by Center for Biological Diversity, Gulf Restoration Network (13-234).
06/30/2014	121	REPLY in support of Cross Motion for Summary Judgment filed by Center for Biological Diversity, Gulf Restoration Network (13-413).
06/30/2014	122	REPLY in support of Cross Motion for Summary Judgment filed by Center for Biological Diversity, Gulf Restoration Network (13-362).
08/20/2014	129	MOTION HEARING held on 8/20/2014 before Judge Martin L.C. Feldman: Matter taken under submission.
08/22/2014	130	ORDER AND REASONS: ORDERED the defendants' 89 - 91 Motion for Summary and 93 - 95 Motion for Summary Judgment are DENIED IN PART and

DATE	NO.	DESCRIPTION
		GRANTED IN PART as stated herein; and the plaintiffs' cross motions 67, 69 and 80 Motion for Summary Judgment are GRANTED IN PART and DENIED IN PART as stated herein.
08/26/2014	131	NOTICE OF APPEAL by Markle Interests, LLC.
08/27/2014	132	JUDGMENT entered.
08/28/2014	133	NOTICE OF APPEAL by Weyerhaeuser Company.
09/05/2014	134	NOTICE OF APPEAL by P&F Lumber Company 2000, LLC, PF Monroe Properties, L.L.C.
09/10/2014	135	Notices of Appeal filed by Markle Interests, LLC and by Weyerhaeuser Company consolidated.
09/15/2014	136	APPEAL TRANSCRIPT of Motion Hearing of August 20, 2014.

Relevant Docket Entries

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Markle Interests, L.L.C., et al v. U.S. Fish and Wildlife Service, et al

No. 14-31008

DATE	DESCRIPTION
09/09/2014	CLERK ORDER consolidating cases 14-31008, 14-31021.
09/09/2014	CASE CAPTION updated. Additional appeal filed. Parties added: Appellants P&F Lumber Company 2000, L.L.C. and PF Monroe Properties, L.L.C. in 14-31008.
12/03/2014	BRIEF FILED by Weyerhaeuser Company, Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., and PF Monroe Properties, L.L.C.
12/04/2014	RECORD EXCERPTS FILED.
12/18/2014	AMICUS CURIAE BRIEF FILED by American Farm Bureau Federation, National Alliance of Forest Owners, National Association of Home Builders.
01/05/2015	APPELLEE'S BRIEF FILED by Appellees Gulf Restoration Network and Center for Biological Diversity.
01/05/2015	RECORD EXCERPTS FILED by Appellees Gulf Restoration Network

	and Center for Biological Diversity.
02/04/2015	APPELLEE'S BRIEF FILED by United States.
03/09/2015	APPELLANT'S REPLY BRIEF FILED.
06/02/2015	ORAL ARGUMENT HEARD.
06/30/2016	PUBLISHED OPINION FILED.
06/30/2016	JUDGMENT ENTERED AND FILED.
07/29/2016	PETITION for rehearing en banc.
08/09/2016	AMICUS CURIAE BRIEF FILED by States of Alabama, Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Montana, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Texas and Wyoming in Support of Appellants' Petition for Rehearing En Banc.
08/16/2016	COURT DIRECTIVE ISSUED requesting a response to the petition for rehearing en banc.
08/26/2016	OPPOSITION of the United States to petition for rehearing en banc.
08/26/2016	OPPOSITION of the Center for Biological Diversity and Gulf Restoration Network to petition for rehearing en banc.
02/13/2017	ORDER denying petition for rehearing en banc.
02/22/2017	MANDATE ISSUED.

Pechmann Peer Review Comment (Aug. 17, 2010)

I appreciate the opportunity to provide a peer review for the U.S. Fish and Wildlife Service proposed rule: Endangered and threatened wildlife and plants: designation of critical habitat for Mississippi gopher frog (Docket ID: FWS-R4-ES-2010-0024). I will organize this review around the list of points that the Service seeks comments on:

1. *Reasons why we should or should not designate habitat as "critical habitat."* I agree with the reasoning presented on why designation of critical habitat for *R. sevosa* is prudent.

2. *Identifying and clarifying the physical and biological features essential to the conservation of R. sevosa.* These are summarized well in the proposed rule.

3. *The amount and distribution of Mississippi gopher frog habitat.* The Service based the amount of terrestrial habitat proposed for protection around each breeding pond on the furthest distance *R. sevosa* moved from Glen's Pond in a study by Richter et al. (2001), 299 m, plus an additional 50 m buffer zone. Preliminary results from an ongoing radiotelemetry study have found a similar maximum movement distance of 240 m for 17 *R. sevosa* at Glen's Pond (John A. Tupy unpublished data). Data are available for only one *R. sevosa* at another site, a female radiotracked to 130 m from Mike's Pond (John A. Tupy, unpublished data). Maximum movement distances for *R. sevosa* at Glen's Pond are lower than those reported for the closely related *R. capito* in seven studies reviewed by Roznik et al. (2009), with the exception of one study having a sample size of only two individuals. For the three studies re-

viewed having a sample size of greater than 2 individuals maximum distances were 396 m (Roznik et al. 2009), 460 m (Blihovde 2006), and 691 m (Roznik and Johnson 2009). A newly-completed study found that 9 adult *R. capito* in North Carolina moved to summer burrows ranging from 505 m to 3.5 km from their breeding pond (W. Jeffrey Humphries and Michael A. Sisson unpublished data). Preliminary results from an ongoing radiotelemetry study of another closely related species, *R. areolata*, found that 29 adults in Indiana moved an average of 372 m and a maximum of 1023 m from their breeding ponds (Jennifer Heemeyer and Michael J. Lannoo unpublished data). Critical habitat extending 350 m from the pond would protect none of the *R. capito* in North Carolina and only 62 % of the *R. areolata* in Indiana.

Differences in maximum distances moved from the pond between *R. sevosa* and its closely related congeners may indicate differences among species, differences among sites, or both. The differences observed within *R. capito* suggest that differences among sites play some role. Although the Service used data for *R. capito* elsewhere in its determination of critical habitat for *R. sevosa*, it used only the data available for *R. sevosa* for determining the amount of terrestrial habitat required for *R. sevosa*. I fear that the *R. sevosa* data may be too limited to adequately assess the potential variation in terrestrial habitat use of this species among sites and over time, however, including future variation at Glen's Pond. That is particularly true if the use of habitat surrounding Glen's Pond has been limited by past land use practices, as suggested by USFWS (2001) and Richter et al. (2001).

I believe that a safer approach would be to also consider the amount of terrestrial habitat used by

R. capito and *R. areolata* in determining the amount needed by *R. sevosa*. The types of terrestrial habitats used by these three species and other aspects of their ecology, life history, and behavior are very similar. One simple option would be to use the median maximum distance frogs were found from the pond in the available studies, 460 m, plus a buffer, e. g., 50 m. This would extend critical habitat to 510 m from each breeding pond, rather than the proposed 350 m. The Service previously required that developers of a planned community north of Glen's Pond maintain their lands within 531 m of Glen's Pond as suitable gopher tortoise habitat for the life of the development (USFWS 2001). The Service noted that this land would also provide suitable terrestrial habitat for *R. sevosa* and required that the Army Corps of Engineers recognize the establishment of a "Temporary no build zone" extending 531 m from Glen's Pond by the developer for the benefit of *R. sevosa* (USFWS 2001).

Using the maximum distance moved protects 100% of the frogs for which data are available, which is the most conservative approach. Another approach would be to determine the median or average distance required to protect 80 % or 90 % of the frogs in these studies. This would require access to the distance moved for each frog in each study.

Areas occupied at the time of listing. These are summarized well in the proposed rule.

Special management considerations or protections for habitat features. These are summarized well in the proposed rule.

Areas not occupied at the time of listing essential for conservation of the species. These are summarized reasonably well for Mississippi in the proposed rule.

I particularly applaud the intention to connect breeding ponds with suitable terrestrial habitat to form metapopulations. I encourage the Service to consult with Glen Johnson and the Mississippi Department of Wildlife, Fisheries, and Parks to determine if any of the sites from which *R. sevosa* disappeared in the last 30 years should be designated critical habitat.

I believe that it is essential for the conservation of the species to designate critical habitat in Louisiana, and in Alabama if possible, in addition to the habitat proposed for designation in Mississippi. As noted in the proposed rule, climate change may lead to increased frequency and duration of droughts in the southeastern U. S. (Seager et al. 2009). *Rana sevosa* do not breed when drought prevents the breeding pond from filling to an adequate depth (Richter and Seigel 2002). Even if breeding occurs, juvenile recruitment fails or is reduced if drought causes the pond to dry before larvae can reach the minimum size for metamorphosis, as happens frequently at Glen's Pond (Sisson et al. 2008). Disease is also a threat to *R. sevosa* (Overstreet and Lotz 2004, Cook 2008). Due to the low number of remaining populations and its very restricted range, *R. sevosa* may be at risk of extirpation from events such as drought or disease which vary over space and time. Maintaining sites over the entire range of *R. sevosa* into which it could be translocated is essential to decrease the potential risk of extinction of the species from events such as these, and provide for the species' eventual recovery. Potential *R. sevosa* translocation sites must be spread out over as wide a geographic area as possible because events such as droughts and disease tend to be spatially autocorrelated. Therefore, *Rana sevosa* will be less at risk of extinction if populations of *R. sevosa* are es-

tablished across its range in Louisiana and Alabama, rather than just in southern Mississippi.

The pond where *Rana sevosa* was last documented in Louisiana in 1967, located near Florenville, retains the required characteristics necessary to serve as a breeding pond (PCE 1) as described in the proposed rule (Pechmann et al. 2006). Another pond located nearby also retains these characteristics (Pechmann et al. 2006). Although the terrestrial habitat surrounding these ponds is currently in commercial pine plantations, it retains some stump holes and could be restored to suitable upland habitat for *R. sevosa* (PCE's 2 and 3). I am unfamiliar with available *R. sevosa* habitat in Alabama, but I encourage the Service to investigate possible locations for designation of critical habitat in that state.

4. *Effects of land-use designations and current or planned activities.* These are summarized well in the proposed rule.

5. *Probably economic, national security, or other relevant impacts.* I am not aware of any.

6. *Candidate areas for exclusions under section 4(b)(2) of the Act.* I am not aware of any.

7. *Economic costs or benefits.* These await full analysis.

8. *Projected and likely effects of climate change.* See discussion above under *Areas not occupied at the time of listing essential for conservation of the species.* Also, because of predicted increased variation in precipitation, it will be necessary to designate ponds having a variety of hydroperiods as critical habitat to insure that at least some ponds are suitable for *R. sevosa* reproduction and juvenile recruitment over periods of several years.

9. *Improving or modifying the Service's approach.* No suggestions needed.

10. *Appropriateness of name change.* I agree that the name of the listed entity should be changed to *Rana sevosa* following Young and Crother (2001). I think that the Service should use the standard common name dusky gopher frog for *R. sevosa*, however (Frost et al. 2008, p. 8). The proposed rule states that the Service will use Mississippi gopher frog to avoid confusion with populations of *R. capito* which some still call dusky gopher frog. I believe that using a nonstandard common name will engender more confusion than it alleviates.

Although Frost et al. (2008) use the genus *Lithobates* for the listed entity, I agree with the decision of the Service to retain *Rana* following Bossuyt et al. (2006).

Joseph H. K. Pechmann, Associate Professor
Western Carolina University

LITERATURE CITED (excluding those cited in proposed rule)

Bossuyt, F., Brown, R. M., Hillis, D. M., Cannatella, D. C., and Milinkovitch, M. C. 2006. Phylogeny and biogeography of a cosmopolitan frog radiation: late Cretaceous diversification resulted in continent-scale endemism in the family Ranidae. *Systematic Biology* 55, 579–594.

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Frost, D. R., R. W. McDiarmid and J. R. Mendelson III. 2008. Anura: Frogs. *IN* B. I. Crother (ed.),

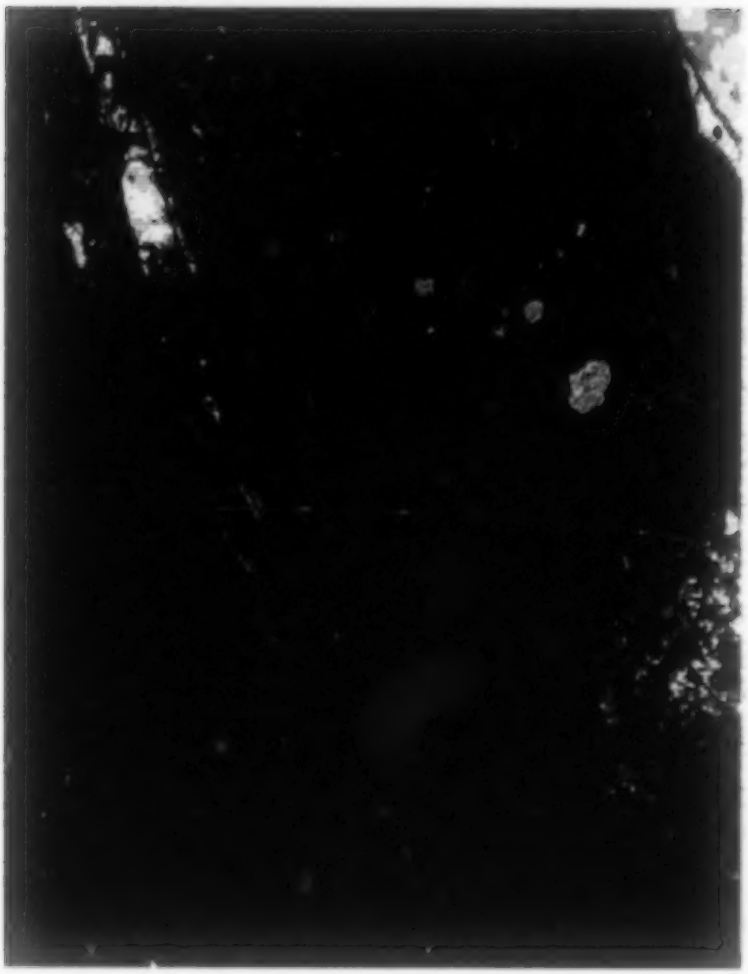
Scientific and Standard English Names of Amphibians and Reptiles of North America North of Mexico, pp. 2–12. SSAR Herpetological Circular 37.

U.S. Fish and Wildlife Service. 2001. Biological opinion on the issuance of a master permit for the Tradition Development as a result of formal consultation under the Endangered Species Act with the Army Corps of Engineers. Jackson Field Office, Jackson, Mississippi. 27 pp.

JA17

Image of Amy's Pond (Mar. 3, 2011)

Image of Dry Pond (Mar. 3, 2011)

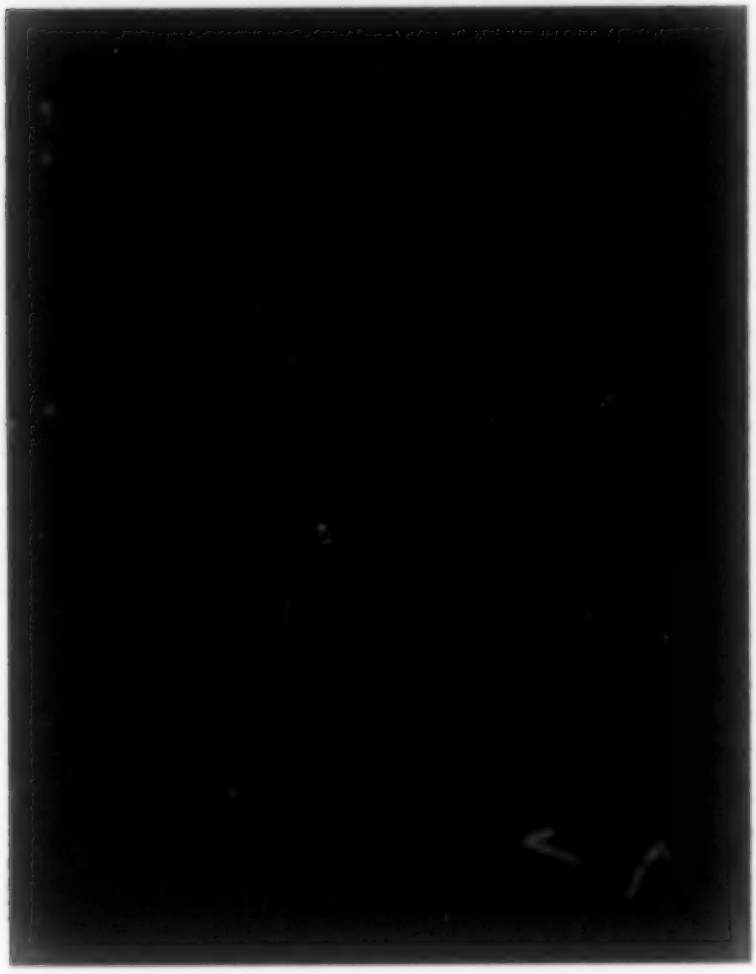


JA19

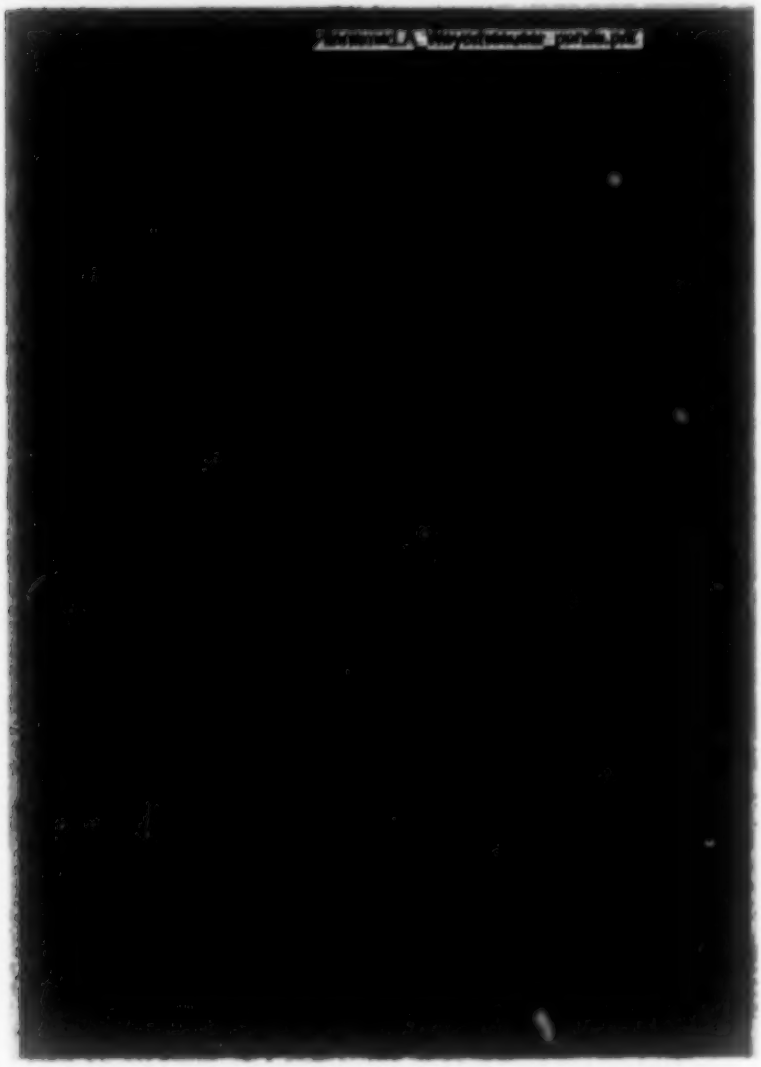
Image of Sevosa Pond (Mar. 3, 2011)

JA20

Image of Sevosa Pond Side Basin (Mar. 3, 2011)



Satellite Image with Ponds Identified (Mar. 3, 2011)



Lannoo Peer Review Comment (Oct. 27, 2011)

Comments on FWS–R4–ES–2010–0024: Revised Proposed Designation of Critical Habitat for the Mississippi Gopher Frog and Announcement of Associated Draft Economic Analysis

Mississippi Gopher Frogs (*Lithobates* [*Rana*] *sevosus*) are part of a species complex (the *Nenirana* subgenus of Hillis and Wilcox, 2005) that includes their sister species, Gopher Frogs (*L.* [*R.*] *capito*), and the outgroup species to Gopher Frogs, Crawfish Frogs (*L.* [*R.*] *areolatus*). All three species are similar enough in morphology and biology that they were once considered a single species, and all three species are of deep conservation concern. For example Gopher Frogs have recently been petitioned for Federal Listing. And we have recently determined that of 85 counties where Crawfish Frogs historically occurred east of the Mississippi River (in Indiana, Illinois, Kentucky, Tennessee, and Mississippi), they now occur in only 34 (a 60% reduction); plus we have data from Indiana showing that even in counties where Crawfish Frogs persist, populations have been lost. One of the problems in understanding the conservation needs of Mississippi Gopher Frogs is that with only one established population centered around a single breeding wetland, it can be difficult to know everything necessary about their conservation needs. Therefore, comparative data from Gopher Frogs and Crawfish Frogs offer insight.

All three Gopher Frog/Crawfish Frog species are exhibiting declines out of proportion to syntopic pond-breeding species. That is, while water-associated diseases and droughts have taken their toll on the eggs and tadpoles of these three species, other species such as Southern Leopard Frogs (*L.*

[*R.*] *sphenocephalus*), Chorus Frogs (*Pseudacris triseriata* complex), and Spring Peepers (*P. crucifer*), exposed to the same threats have not been declining to the same extent. Part of this response is due to having more populations, and more individuals per population, than members of the Gopher Frog/Crawfish Frog complex (affording a buffer), but a second part of this response is that unlike the more common species, members of the Gopher Frog/Crawfish Frog complex have unusually specific upland habitat requirements, as follows.

First, all three Gopher Frog/Crawfish Frog species depend on open upland habitats. Both Gopher Frog species rely on open canopy longleaf pine savannahs, Crawfish Frogs rely on tallgrass prairies. These are ecosystems maintained by fire, and with fire suppression practices common in the late 19th and throughout much of the first three-quarters of the 20th centuries, they became overgrown with late successional woody species. Recent habitat management practices based on prescribed burns and light grazing have re-established these habitats in many, but not all, places.

Secondly, all three Gopher Frog/Crawfish Frog species occupy subterranean burrows built by other species (Gopher Tortoises [*Gopherus polyphemus*], and burrowing crayfish [many species including members of the genus *Cambarus*]). Crawfish Frogs are obligate crayfish burrow dwellers; both Gopher Frog species will use other burrow types, including those made by mammals, as well as pine stump holes. Crawfish Frogs exhibit fidelity to upland burrows, and a large proportion of individuals may use a single burrow their entire lives. Burrows clearly provide protection from predators (Crawfish Frogs outside of burrows are 12 times more likely to get eaten

than Crawfish Frogs in burrows; Heemeyer, 2011), and Crawfish Frogs in burrows can successfully thwart predation attempts by large snakes; Engbrecht, Heemeyer and Lannoo, unpubl. data). Burrows also provide protection from fires, as well as places to rehydrate and to avoid summer and winter temperature extremes. Post-metamorphic juvenile Gopher Frogs that find suitable burrows can avoid predation (Roznick and Johnson, 2009); among northern (Indiana, Illinois, and historically Iowa) populations of Crawfish Frogs, juveniles must find a burrow at least 75 cm deep in order to overwinter below the frost line.

We do not yet know the extent to which upland burrows are limiting. Clearly with the conservation concerns surrounding Gopher Tortoises, there cannot be as many tortoise burrows available to Mississippi Gopher Frogs or Gopher Frogs as there were historically. The situation for Crawfish Frogs is less clear. We recently surveyed 20 ha of a 45 ha prescribed burn encompassing the densest population of Crawfish Frogs known from Indiana. We located and measured nearly 6,000 burrows (> 5,900), and found only 5 burrows inhabited by Crawfish Frogs (Engbrecht and Lannoo, unpubl. data). It seems reasonable to assume that with all the species dependent on subterranean retreats (invertebrates, amphibians, reptiles, small mammals) that numbers of burrows per se is not an adequate metric for assessing habitat availability for members of this group; burrows must be adequately constructed (difficult to determine without excavating and thus destroying them), and unoccupied.

A third feature of members of the Gopher Frog/ Crawfish Frog complex is their ability to migrate long distances (> 1 km in Crawfish Frogs [Heemeyer,

2011]; > 3 km in Gopher Frogs) to upland burrows. Adult frogs migrating these distances will return to the same burrow. The work of Humphries and Sisson (pers. comm.) on Gopher Frog populations in North Carolina suggests burrows in their study population are limiting, and the reason for such long post-breeding migrations is the need for frogs to travel these distances in order to find suitable burrows in the first place. To protect populations, these distances would have to be incorporated into a protected buffer zone. The construction of artificial burrows (but what would they look like, how would they be built, and at what cost?) might reduce the radius of this buffer zone, but this is a management option that has not yet been tested. Working on Crawfish Frogs in Indiana, we have made the following management recommendations:

> "A buffer (core habitat plus terrestrial buffer) of at least 1.2 km around each breeding wetland. Within this buffer at least 3 critical habitat elements must be present: 1) extensive grasslands maintained by prescribed burning and/or logging; 2) an adequate number of upland crayfish burrows; and 3) no soil disturbance of the sort that would destroy crayfish burrow integrity."

Without the tight requirement for burrows to be crayfish burrows, a similar guide might be suitable for Mississippi Gopher Frogs.

The important point here is that while much of the conservation emphasis on Gopher Frogs/Crawfish Frogs has necessarily (and reasonably) focused on aspects of the fishless, seasonal/semipermanent wetlands used for breeding, recent work suggests that equal emphasis must be placed on the large ar-

eas of surrounding habitat used by adults (and juveniles) during the 10 or 11 months of the year when not breeding. The two aspects of this upland habitat that we can control for these frogs are: 1) it must be large and 2) it cannot be exposed to any soil disturbance of the sort that would destroy the integrity of subterranean burrows. Creative thinking regarding burrow construction would also be helpful. This is a lot to ask, but this is likely what is required to save Mississippi Gopher Frogs (as well as Gopher Frogs and Crawfish Frogs).

While conservation measures on public lands (federal and state) can probably proceed as planned, if the 2,983 acres of proposed private land cannot be utilized (either through agreement or purchase) for this critical habitat, it will be necessary to find other, suitable property within the historic range of Mississippi Gopher Frogs and repatriate populations to these sites. In fact, this might be desirable no matter what becomes of the situation with the private land acquisition.

Literature Cited

Heemyer, J.L. 2011. Breeding migrations, survivorship, and obligate crayfish burrow use by adult Crawfish Frogs (*Lithobates areolatus*). M.S. Thesis, Biology Department, Indiana State University, Terre Haute, IN.

Hillis, D. M., and T. P. Wilcox. 2005. Phylogeny of the new world true frogs (*Rana*). Molecular Phylogenetics and Evolution 34:299–314.

Roznik, E. A., and S. A. Johnson. 2009. Burrow use and survival of newly metamorphosed gopher frogs (*Rana capito*). Journal of Herpetology 43:431– 437.

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St. Tammany Parish Council Resolution (Nov. 3, 2011)

ST. TAMMANY PARISH COUNCIL
RESOLUTION

RESOLUTION COUNCIL SERIES NO: C-3274

COUNCIL SPONSOR: STEFANCIK

PROVIDED BY: COUNCIL ATTORNEY

A RESOLUTION OPPOSING THE DESIGNATION OF 1649 ACRES OF PRIVATE LAND IN ST. TAMMANY PARISH AS CRITICAL HABITAT FOR THE MISSISSIPPI GOPHER FROG BY THE U.S. FISH AND WILDLIFE SERVICE.

WHEREAS, St. Tammany Parish has a vital interest in the health, safety, economy and welfare of its citizens and issues that directly impact residents within its boundaries; and

WHEREAS, the U.S. Fish and Wildlife Service, through rule-making published in the Federal Register, Vol. 76, No. 187, on Tuesday, September 27, 2011, has proposed designating 1649 acres of private land in St. Tammany Parish located north and south of State Hwy. 36, approximately 3.1 km (1.9 mi) west of State Hwy. 41 and the town of Hickory, Louisiana, as critical habitat for the Mississippi Gopher Frog, where the U.S. Fish and Wildlife Service has concluded the Mississippi Gopher Frog has not been sited since 1965, which was many years before the enactment of the U.S. Endangered Species Act; and

WHEREAS, critical habitat as described by the U.S. Fish and Wildlife Service consisting of fire-maintained Long-Leaf Pine does not exist within the proposed site which is currently managed for timber

cultivation and harvesting; the silviculture activities used to maintain the lands for timber cultivation will not permit the habitat to exist; and there is hardwood surrounding the ponds identified by the U.S. Fish and Wildlife Service in the proposed rulemaking, which shades the ponds that will prevent the Mississippi Gopher Frog from surviving, as sunlight is necessary for their survival; and

WHEREAS, the proposed site after extensive comprehensive planning, has been zoned by St. Tammany Parish for future development in this area that is favorable for human habitation as it is safe from hurricane flood inundation as experienced in other areas during Hurricane Katrina, will provide traditional neighborhoods with open space and housing for residents of St. Tammany Parish, and the designation of the lands as critical habitat may remove the site from commerce and have an adverse economic impact of more than $ 36.2-million dollars, most of which will adversely impact small businesses and families in St. Tammany Parish, including an adverse impact on the tax revenues to St. Tammany Parish due to lost taxes on undeveloped land, which is inadvisable in this time of National and International economic turmoil; and

WHEREAS, the proposed site contains a portion of Highway 36 which is a critical east-west transportation route in St. Tammany Parish and by the use of frequent fires necessary to maintain the habitat would create a public safety issue; and

WHEREAS, the St. Tammany Parish Council understands that the 1649 acres are not essential for survival of the Mississippi Gopher Frog and are some 47 miles from nearest colony in Mississippi, and the U.S. Fish and Wildlife Service cannot re-create the

non-existent critical habitat for the Mississippi Gopher Frog or locate colonies of the Mississippi Gopher Frog on the lands, and the landowner does not intend to re-create or locate colonies of the Mississippi Gopher Frog on the lands; and

WHEREAS, the U.S. Fish and Wildlife Service has not performed a population analysis to determine if the Mississippi Gopher Frog population can/cannot regenerate, as required by the U.S. Endangered Species Act, and pertinent regulations thereunder, and there is no showing that the 1649 acres are essential to the survival of the Mississippi Gopher Frog, and there are many acres of other lands in the proposed rule-making which are federal lands and therefore ideal for such designation; and

WHEREAS, the 1649 acres in question do not have critical habitat characteristics and the U.S. Fish and Wildlife Service has not shown proof that the lands are required for survival of the Mississippi Gopher Frog, and therefore its conclusions are unsupported by facts insofar as concerns these lands.

THE PARISH OF ST. TAMMANY HEREBY RESOLVES that the St. Tammany Parish Council officially opposes the designation of the proposed 1649 acres of private land in St. Tammany Parish, located north and south of State Hwy. 36, approximately 3.1 km (1.9 mi) west of State Hwy. 41 and the town of Hickory, Louisiana, located within its boundaries, as critical habitat for the Mississippi Gopher Frog, as proposed in the rule-making published in the Federal Register, Vol. 76, No. 187, on Tuesday, September 27, 2011.

THIS RESOLUTION HAVING BEEN SUBMITTED TO A VOTE, THE VOTE THEREON WAS AS FOLLOWS:

MOVED FOR ADOPTION BY: STEFANCIK SECONDED BY: BELLISARIO

YEAS: DEAN, THOMPSON, FALCONER, GOULD, HAMAUEL, CANULETTE, BELLISARIO, BLUM, STEFANCIK, BINDER, ARTIGUE (11)

NAYS: (0)

ABSTAIN: (0)

ABSENT: COOPER, HOWELL, BURKHALTER (3)

THIS RESOLUTION WAS DECLARED ADOPTED ON THE 3 DAY OF NOVEMBER, 2011. AT A REGULAR MEETING OF THE PARISH COUNCIL, A QUORUM OF THE MEMBERS BEING PRESENT AND VOTING.

_____

MARTIN W. GOULD, JR.,
COUNCIL CHAIRMAN

ATTEST:

THERESA L. FORD, COUNCIL CLERK

Public Comment on Behalf of P&F Lumber (Nov. 23, 2011)

* * *

The Landowners are virtually all descendants of John Poitevent, one of the founders of the Poitevent & Favre Lumber Co., who acquired the lands starting in the 1880s. The Lands have thus largely been in family hands for well over 100 years. The current owners wish to have their children and grandchildren take over ownership of the Lands in the future. This goal will be thwarted by the designation of the Lands as critical habitat for the MGF.

The Landowners are a "small entity" under applicable federal law. *See*, Draft August 17, 2011 Economic Analysis of Critical Habitat Designation for the Mississippi Gopher Frog published along with the Proposed Rule (the "DEA") (page A-5) at Federal Register Docket ID: FWS-R4-ES-2010-0024. The provisions of the DEA are incorporated herein.

Weyerhaeuser Company leases the Lands from the Landowners under its long term timber lease expiring in 2043 to grow and harvest timber, primarily pine sawtimber. The Landowners will continue employing the same silviculture methods and techniques employed by Weyerhaeuser after the timber lease expires in 2043 if the Lands are designated as critical habitat so that the Landowners may obtain some economic benefit from them, unless they are developed by the Landowners sooner if the Lands do not become critical habitat for the MGF. Thus, as is amply demonstrated in this letter of comment, because the Lands do not now contain the "primary constituent elements" to permit the MGF to exist on the Lands—and, indeed, the FWS in the Proposed Rule concludes that (by its own investigation on the

Lands) the MGF does not now actually occupy the Lands—it is certain that both the critical habitat and the MGF will never exist on the Lands.

(iii) Recent Events Affecting the Lands

Following the devastation of the New Orleans area by Hurricane Katrina on August 29, 2005, it became clear that many South Louisiana residents were not going to continue to live in low-lying areas. St. Tammany Parish experienced a dramatic growth rate in population on that date that has continued.[1] See also, DEA at page 4-2 and 4-3. As fully documented in the DEA, the location of the Lands in St. Tammany Parish north (above) Interstate 12 ideally suits them for future development where people can live safely in this area without the fear of the devastating flooding that accompanied Hurricane Katrina.[2]

Beginning in 2006, the Landowners and their partner (Weyerhaeuser Real Estate Development Co.) spent several hundred thousand dollars on a massive comprehensive planning and zoning effort to accommodate this future development on the Lands. The results of this effort were then approved by both the St. Tammany Parish Planning and Zoning Com-

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[1] The 2010 US census shows that there are some 240,000 residents in St. Tammany Parish, which is an astonishing growth rate of 22.2% for the decade. See http://quickfacts.census.gov/qfd/states/22/22103.html

[2] The Federal Emergency Management Agency has declared that Interstate 12, which runs on an east-west route through the Parish, is the line below which there will be mandatory evacuations when the next hurricane comes *The Role of Social Science Research on Preparedness and Response ftp.resource.org/gpo.gov/hearing109h/24463.pdf*

mission and the St. Tammany Parish Council.[3] Thus, CHU #1 is ready for the development of homes, businesses and recreation that will surely come once the current real estate crisis has passed. *See,* DEA at pages 4-1 and following for a detailed description of what the Lands represent to St. Tammany Parish.

There is no doubt that the location of the Lands makes them ideal for human habitation as they are safe from hurricane flood inundation as experienced in other areas during Hurricane Katrina. Moreover, the sensitive planning and zoning efforts by the Landowners and their partner will provide traditional neighborhoods with open space, housing and parks for current and future residents and businesses in St. Tammany Parish.

(iv) Highly Negative Direct and Indirect Economic Consequences to Landowners, St. Tammany Parish and the State of Louisiana Come From Designation

Designation of the Lands by the FWS as critical habitat for the MGF will destroy these carefully-made plans and remove the site from commerce, with an adverse direct economic impact on the "small entity" Landowners of some $36.2+ million dollars. See, pages A-6, ES-4, ES-5, ES-8, ES-9, 4-1, 4-6 and 4-14 of the DEA. As such, the huge $36.2+ million economic burden confirmed by the DEA of designating the Lands as critical habitat for the MGF will adversely impact the small entity Landowners exclusively.

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[3] The details of these extensive efforts by the Landowners and their partner are set out on pages 4-2 and 4-3 of the DEA.

There are other highly negative economic consequences that will befall both the Landowners, St. Tammany Parish and the State of Louisiana as a result of the proposed designation that are utterly ignored by the DEA, but which are real.

In addition to the direct impact of $36.2+ million to the Landowners, the Landowners will also clearly suffer economic harm to their adjacent lands in the vicinity of CHU #1. The FWS in the DEA and in the Proposed Rule indicates that frequent burning of the Lands in CHU #1 for the proposed critical habitat will be required. See, DEA at pages 1-4 and 4-3 ("The Service has indicated that in order to properly manage ... CHU #1, prescribed burnings would be necessary") and Proposed Rule at page 59780 and 59788. Smoke and flames from these burnings will drift and flames will imperil homes and businesses nearby. Indeed, the very real presence of such burnings will also very likely halt all development of Landowners' adjacent lands as the danger and health hazards from the smoke and flames will likely chill any residents or businesses from locating there.

When asked by the Landowners' attorney to address these very real negative economic impacts of burning, the FWS threw up its hands and ignored them in the DEA, along with inquiries about the negative economic impact of oil and gas drilling on the Lands.[4]

Additional negative economic consequences of the burning includes the loss of revenue from the Lands and the Landowners' adjacent lands and lost

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[4] See attached email correspondence to and from FWS representatives on this subject, attached hereto and made a part hereof as Exhibit "B".

ad valorem property tax and sales taxes that would have gone to St. Tammany Parish and the State of Louisiana.

* * *

Jensen Peer Review Comment (Nov. 28, 2011)

Submitter Information

Name: John Bruce Jensen

Address:

Forsyth, GA, 31029

Organization: Georgia DNR

Government Agency Type: State

Government Agency: GA Department of Natural Resources

General Comment

Thank you for the opportunity to comment, as a requested peer reviewer on the revised, proposed critical habitat designation for the Mississippi Gopher Frog (Rana sevosa).

I have read through the revised proposal and found it to be thoroughly researched and the conclusions made on critical habitat designation well-founded. It would be hard to argue that a species reduced to one, maybe two, viable breeding population(s) and a single experimental released population is not overwhelmingly deserving of the added protection afforded it by designating its current occupied range and proposed release sites as critical habitat. Further, I see no reason why the designation of critical habitat for this species would have the unintended consequence of further imperiling the animal.

I fully support the Service's proposed critical habitat designation of currently unoccupied habitat to serve as captively-reared frog release sites, as well as of those sites where the species currently persists. The repatriation sites chosen have the "primary constitu-

ent elements" and have clearly been selected in part because of the particular land ownership and the ability to guide proper land management there.

My only significant criticism of the previous proposal was the far too limited upland habitat proposed as critical to the species' survival, and the data (movement data from just a handful of radio-tracked frogs) used for determining the insufficient upland buffer size. Using data from additional studies of gopher frog movements, it is clear the Service has now better approximated the upland habitat likely necessary for populations to persist. While more upland habitat would certainly be safer, I think the 600 m buffer is quite acceptable and better balances the needs of the frog and that of landowners.

Sincerely,

John Jensen

Richter Peer Review Comment (Nov. 28, 2011)

28 November 2011
Stephen Ricks
Field Supervisor
United States Department of the Interior
Fish and Wildlife Service
6578 Dogwood View Parkway; Suite A
Jackson, MS 39213-7856

Dear Sir,

I appreciate the opportunity to serve as a peer reviewer for the revised proposed rule to designate critical habitat for Mississippi Gopher Frogs. I have been studying this species since 1995, and I would like to begin by stating that I wholeheartedly support the designation of critical habitat. I applaud the proactive designation of multiple areas currently unoccupied by the species but that represent promising sites for reintroductions to what appear to be historic breeding ponds and surrounding uplands. These additional sites truly are essential to the conservation of the species. It might not be apparent to the public, but even though there are only up to a few hundred individuals of the species in the wild, these new sites are absolutely necessary because without establishing new populations, the species will not recover. Techniques in the field and captivity are highly successful in producing offspring for reintroductions to suitable habitats, and the one site where reintroductions of first-year juveniles occurred has shown promise with calling and reproduction. This approach of reestablishing populations in the historic range has great potential.

In my review of the original proposed rule, I stated that it was carefully written with accurate and thorough reference to life history details necessary to

designate habitat with one major exception, spatial ecology of individuals and space/habitat requirements for self-sustaining populations. I want to reiterate that here. The most crucial life history consideration for long-term maintenance of viable populations is providing sufficient upland habitat surrounding breeding wetlands. Although this concern was addressed in the revised proposal (proposed size of designated critical habitat was increased from a 350-m radius circle to a 650-m radius circle), based on the best available data, this size is still insufficient for the conservation of the species. This statement is supported by solid science of this species and of another gopher frog species with an identical life history.

There are at least three reasons the Service should not be conservative in setting the size of critical upland habitat around each wetland:

(1) When populations become isolated as has occurred for *Rana sevosa*, maintaining a large population size becomes especially critical. Richter et al. (2009) demonstrated that genetic variation in Glen's Pond population of *R. sevosa* has been severely reduced due to habitat isolation and small population size relative to other non-isolated and larger populations of gopher frogs. This population is currently the largest population of *R. sevosa*. Glen's Pond population is limited in size due to the loss of suitable habitat north of the USFS property, which is currently owned by Tradition Properties, Inc. In these situations, management strategies must be employed that maximize population size. For pond-breeding species, the primary determinant of population size is availability of upland habitat to support the maximum number of individuals. Thus, the size and quality of critical upland habitat and buffer surrounding it are

essential to the conservation and long-term persistence of the species.

(2) Circular areas of protection should be avoided where possible because they do not take into consideration the distribution of suitable habitat. For example, unsuitable habitat might begin 50 m south of a pond habitat whereas 800 m north of the pond may be the highest quality habitat, so a circle with 650-m radius of protected area might be ineffective and inappropriate. Semlitsch and Bodie (2003) refer specifically to *Rana sevosa* and other habitat-specialists where "it is not known, however, how protecting different amounts of terrestrial habitat affects the population persistence of any species or how habitat quality (e.g., density of mammal burrows; Loredo et al. 1996) might influence that decision." In cases of critical upland habitat designation rules to be applied to multiple sites, logistics might require that a circle with a standard radius be used. In these cases, the radius size should be increased to deal with uncertainty of habitat suitability (Semlitsch and Bodie, 2003).

(3) As described in the revised proposed rule, quite a bit of variation exists among studies in maximum distances that gopher frogs have been documented to travel from breeding ponds. Maximum movements from breeding ponds of individual populations ranged from 299 m to 3470 m. This makes sense because sites vary in upland habitat quality and ability of the landscape to support long-distance movements. Local features will determine spatial requirements of populations, so the size of designated habitat needs to encompass this variation.

In the revised proposed rule, the Service used the median value of all studies' maximum distance documented to arrive at the 600-m value to serve as the

radius of a circle delineating critical habitat. Rather than treating each study as independent, studies from the same locations should be combined and the maximum distances determined for each population. Maximum distances documented for 8 populations have a mean of 1210 m and median of 731 m. The data are right skewed (maximum distances for 8 populations are 299, 300, 510, 600, 862, 1609, 2000, and 3470 m). When data have this distribution, the median is a better measure of central tendency, but the mean better represents variation in the data and is more appropriate given the circumstances described above.

In terms of taxonomy, I fully support the use of dusky gopher frogs as the standard name of *Rana sevosa* (= *Lithobates sevosus*) as does the scientific community (Frost et al., 2008). The intent of each subsection of Crother (2008) is to provided stable standard English names of amphibians and reptiles of the US and Canada. The four major herpetological societies (American Society of Ichthyologists and Herpetologists, the Canadian Association of Herpetologists, and the Herpetologists' League, and the Society for the Study of Amphibians and Reptiles) and two major herp conservation societies (the Canadian Amphibian and Reptile Conservation Network and Partners in Amphibian and Reptile Conservation) in North America support Crother (2008) as the official list. In fact, all publications of the scientific societies require that authors use standard English names of Crother (2008) when publishing in their journals but leave to the author's discretion the scientific name used (within scientific reason and with citation when needed). Based on all of this, the Service should use dusky gopher frog as the standard name instead of Mississippi gopher frog. I recom-

mend use of *Lithobates sevosus* as the scientific name based on Frost et al. (2006, 2008).

In summary, I strongly support the designation of critical habitat for dusky gopher frogs, which is a major step in the long-term conservation of this species. I highly recommend that the Service modify the proposed size of critical habitat and adopt the average of documented maximum distances moved by individuals across all populations.

Sincerely,

Stephen Richter

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Blihovde Peer Review Comment (Nov. 29, 2011)

Comments on the Proposed Designation of Critical Habitat – the Mississippi Gopher Frog William (Boyd) Blihovde, November 29, 2011

From my experience working with the Mississippi Gopher Frog (MGF), this proposal to protect critical habitat should help ensure that this species has a place to recover from the brink of extinction. The Mississippi Gopher Frog or Dusky Gopher Frog is one of the most imperiled species (or sub-species) in the United States.

In the early 2000's I traveled to Mississippi to assist Dr. Richard Siegel from Southeastern Louisiana University (SELU). I was there to help SELU begin radio telemetry work. I saw first-hand how few individuals were located in DeSoto National Forest, and how much information the researchers needed to make management recommendations. Since then, the researchers at SELU have gathered tremendous information on the movements and habitat needs of the MGF. They have discovered, as I did during my research in Central Florida, that the entire gopher frog group requires a great deal of upland habitat. The MGF is tied to the ephemeral wetlands where they breed, however, they do not linger there. They require the dry, upland habitat around the ponds to feed, find shelter, and find moist conditions (especially after the ephemeral wetlands have dried up). Other researchers in Florida have found gopher frogs over 1,000 meters away from their breeding ponds.

The upland habitat (interspersed with temporary wetlands) is critical to the survival of gopher frogs. The habitat designated in this proposal will be as important to the future of the MGF as the obviously

important breeding ponds. Not only will that habitat need to be protected, it will also need to be properly managed in an aggressive and proactive manner before the habitat becomes unsuitable for gopher frogs. Prescribed fire is the most important management tool needed to create open, early successional staged and biologically diverse ecosystems.

Although I feel that the 7,015 acres of critical habitat proposed here are not enough, I do agree that this is a good start and a good step in helping recover the MGF. The fact that only 43 percent of the critical habitat acres are located on private lands means there will be a very minor economic impact on private individuals. The acres located on already protected federal or state lands will hopefully ensure that those lands get better management in the future. To actually recover the MGF I believe that more critical habitat will be needed in the future. One thing that is definitely needed in the future is protection and proper management of corridors for the MGF to travel between potential breeding ponds. With the MGF occurring at so few breeding ponds, it is imperative that this species be established in additional ponds to be a sink for the well-studied "Glen's Pond". This pond has been the only dependable breeding pond for the MGF for decades. Since its discovery Glen's Pond has been heavily studied and managed. However, without other well-established breeding ponds the MGF will be at risk of being wiped out by a natural disaster, drought, or relatively newly discovered fungi that have been devastating to juvenile amphibians.

The proposal to designate critical habitat for the Mississippi Gopher Frog is a great thing, and I am in support of its implementation.

Pechmann Peer Review Comment (Nov. 29, 2011)

I appreciate the opportunity to provide a peer review for the U. S. Fish and Wildlife Service revised proposed rule: Endangered and threatened wildlife and plants: designation of critical habitat for Mississippi gopher frog (Docket ID: FWS-R4-ES-2010-0024; MO 92210-0-0009). I will organize this review around the list of points that the Service seeks comments on:

1. *Reasons why we should or should not designate habitat as "critical habitat."* I agree with the reasoning presented on why designation of critical habitat for *Rana sevosa* is prudent.

2.a. *The amount and distribution of Mississippi gopher frog habitat.* I applaud the decision to base the amount of terrestrial habitat around each breeding pond proposed for protection on the data available for both *R. sevosa* and the closely related *R. capito*. The types of terrestrial habitats used by these two species and other aspects of their ecology, life history, and behavior are very similar. Data for *R. sevosa* are available from only one site (Glen's Pond) for a limited period, and do not account for potential variation in terrestrial habitat use among sites and over time. That is particularly true if the use of habitat surrounding Glen's Pond has been limited by past land use practices, as suggested by USFWS (2001) and Richter et al. (2001).

The Service delineated critical habitat around breeding ponds based on the median maximum distance frogs were found from the pond in all available studies, 600 m, plus a 50 m buffer (USFWS *personal communication* clarifying information in the proposed rule). This is a very reasonable approach, but

there are alternative approaches. These involve combining data, being more selective about the data used, and calculating mean maximum distances instead of median maximum distances. Calculating means rather than medians yields higher values for the cases at hand because the distribution of maximum distances is skewed rather than normal, and the means are more influenced by the largest values than the medians are. It is a matter of biological opinion whether it's good or bad for the largest values to have more influence. I think medians are more appropriate in this case, but others might think differently.

Alternative approaches include:

Alternative A. Calculating the mean rather than the median of the maximum distance frogs were found from the pond in all available studies. The mean is 998 m.

Alternative B. Combining studies conducted at the same site. This results in a median maximum distance moved of 731 m and a mean maximum distance moved of 1206 m. Two colleagues suggested this alternative because counting multiple studies per site is pseudoreplication if the variation of interest is primarily among sites. Studies by Richter et al. (2001) and Tupy and Pechmann (2011) were both conducted at Glen's Pond. The three studies by Roznik and her colleagues were all at the same set of eight nearby ponds.

Alternative C. Combining studies conducted at the same site (as in Alternative B), deleting anecdotal observations of single frogs, and deleting another study which was not designed to examine distances frogs moved from ponds. The median maximum distance for the remaining five studies is 600 m, the

same value as the Service found in their calculation, and the mean maximum distance is 1072. Three of the records used in the Service's calculations were observations of single frogs in terrestrial habitat and the distance to the nearest breeding pond or presumed breeding pond (Carr 1940, Franz et al. 1988, and Roznik 2007). These observations were recorded and published because of their magnitude and do not represent the maximum value of a known sample of distances (although Roznik 2007 was in the context of her other studies). Also, Blihovde (2006) observed multiple gopher frogs in three plots at known distances from breeding ponds, but did not report where these plots were located relative to overall frog distributions around the pond. Eliminating these four studies leaves telemetry studies at five sites.

This median maximum distance derived in this calculation (and the Service's) comes from Neufeldt and Birkhead (2001). It was measured from the "herpetofaunal array," whereas distances in the other studies were measured from the center of the pond. It would be preferable to use the distance from the center of the pond if it could be obtained. This would also change some of my other calculations.

Alternative D. Weighting each maximum value by the sample size it was based on, and using all studies, gives a mean of 748 m. I don't think that you can weight a median. Although a larger sample size provides a better estimate of the maximum distance frogs move at a site, it is debatable whether sites should be weighted differently based only on this criterion.

The different alternatives provided above yield distances from the pond ranging from 600 m to 1206 m. There are other alternatives, for example, determining the median or average distance required to

protect 80% or 90% of the frogs at each site. This would require calculations using distances moved for each frog in each study.

Thus, the decision on how much critical habitat to designate around each breeding pond is more subjective than we would like it to be. I now summarize some related considerations. Why is there such variation among sites in the maximum distance frogs were found from the pond? In particular, why do gopher frogs migrate 3470 m from the pond in the sandhills of North Carolina (Humphries and Sisson 2011) and only 299 m from Glen's Pond in southern Mississippi? This most likely has to do with habitat quality, particularly the availability of the underground refuges where gopher frogs spend most of their lives. The North Carolina site has very few holes for gopher frogs to use, so they have to migrate a long distance to find one. The paucity of holes may be in part because stumps were harvested at this site in the past (Humphries and Sisson 2011 and personal communication). Holes associated with stumps are popular refuges for gopher frogs, especially where there are few or no gopher tortoise burrows to use (Richter et al. 2001, Humphries and Sisson 2011, Tupy and Pechmann 2011). Other factors such as fire also increase the availability of holes used by gopher frogs (Roznik and Johnson 2009a).

In contrast, there are abundant underground refuges for gopher frogs around Glen's Pond (Tupy and Pechmann 2011), except for the land 200 m north of the pond, where underground refuges have been limited by industrial forestry practices (Richter et al. 2001; personal observations). Thus, gopher frogs at Glen's Pond need not migrate far to find underground refuges, and migrating far to the north brings them to an area with few refuges.

How do the sites with data on the maximum distance frogs were found from the pond compare to other sites? The available data are not sufficient to formally answer this question. Nonetheless, people tend to study gopher frogs where they are relatively abundant (e.g., Roznik et al. 2009, Blihovde 2006) or where landowners manage habitat for their benefit, such as on military bases (e. g., Phillips 1995 and Rostal 1999, Neufeldt and Birkhead 2001). It is not practical to study gopher frogs at most sites where the habitat is poor, because there are too few frogs to study. Thus, I expect that most of the available data on terrestrial habitat use by gopher frogs is from relatively good habitat with sufficient underground refuges available.

Is it necessary to protect terrestrial habitat up to the maximum distance frogs are found from the pond, or is it sufficient to protect the habitat used by most frogs? It may only be necessary to protect the area around each pond used by the vast majority of frogs, e. g., 90-95% of the frogs. The sample sizes (number of frogs observed) for all the available studies of terrestrial habitat use are relatively small, however. Thus, these studies likely underestimate the maximum distances that frogs may be found from a pond. Using the maximum distance frogs were observed from a pond in a small study is likely a reasonable measure of the habitat used by most, but not all, of the frogs.

How much habitat around each pond should be designated as critical habitat? In my opinion, this depends on the habitat quality, particularly the availability of underground refuges. Designating habitat within 650 m of the center of the pond is probably sufficient for Glen's Pond and other units with high-quality terrestrial habitat. More area may

be needed in units where the number of underground refuges has been reduced by current or past industrial forestry practices, such as Unit 1, 7, and 4. Unfortunately, it takes many years of good management to develop new underground refuges, as we have observed in Unit 4.

b. *Areas occupied which should be included in the designation.* These are summarized well in the proposed rule.

c. *Special management considerations or protection in critical habitat, including those related to climate change.* These are summarized well in the proposed rule.

d. *Areas not occupied at the time of listing essential for conservation of the species.* These are summarized well in the proposed rule. I particularly applaud the intention to connect breeding ponds with suitable terrestrial habitat to form metapopulations. I was very pleased to see that the Service designated critical habitat in Louisiana in the revised proposed rule. As noted in the proposed rule, climate change may lead to increased frequency and duration of droughts in the southeastern U. S. (Seager et al. 2009). *Rana sevosa* do not breed when drought prevents the breeding pond from filling to an adequate depth (Richter and Seigel 2002). Even if breeding occurs, juvenile recruitment fails or is reduced if drought causes the pond to dry before larvae can reach the minimum size for metamorphosis, as happens frequently at Glen's Pond (Sisson et al. 2008). Disease is also a threat to *R. sevosa* (Overstreet and Lotz 2004, Cook 2008). Due to the low number of remaining populations and its very restricted range, *R. sevosa* may be at risk of extirpation from events such as drought or disease which vary over space and time. Maintaining sites over the entire range of

R. sevosa into which it could be translocated is essential to decrease the potential risk of extinction of the species from events such as these, and provide for the species' eventual recovery. Potential *R. sevosa* translocation sites must be spread out over as wide a geographic area as possible because events such as droughts and disease tend to be spatially autocorrelated. Therefore, *Rana sevosa* will be less at risk of extinction if populations of *R. sevosa* are established across its historical range in Louisiana as well as Mississippi. Unfortunately, I am not aware of any suitable habitat left in the historical range in Alabama.

The critical habitat proposed in Unit 1 contains the best gopher frog habitat remaining in Louisiana, to my knowledge, and some of the best breeding ponds available anywhere in the historical range of *R. sevosa*. I strongly agree with the Service's determination that this area is essential for the conservation of *R. sevosa*.

3. *Effects of land-use designations and current or planned activities.* These are summarized well in the proposed rule.

4. *Projected and likely effects of climate change.* See discussion above under *Areas not occupied at the time of listing essential for conservation of the species.* Also, because of predicted increased variation in precipitation, it will be necessary to designate ponds having a variety of hydroperiods as critical habitat to insure that at least some ponds are suitable for *R. sevosa* reproduction and juvenile recruitment over periods of several years.

5. *Probable economic, national security, or other relevant impacts (especially Unit 1 in St. Tammany Parish), particularly on small entities or families,*

and benefits of including or excluding areas exhibiting these impacts. Very little of the proposed critical habitat is owned by families or small entities. Most of the private land proposed as critical habitat in Mississippi is owned by a national conservation organization which desires to provide habitat for *R. sevosa*. The land in Unit 1 is owned by a family, but the 1,649 acres of this unit represent only 3.66% of the approximately 45,000 acres this family owns in that Louisiana Parish (Harvey 2011). Thus, any economic or other impacts on this family should be minimal.

6. *Candidate areas for exclusions under section 4(b)(2) of the Act.* I am not aware of any.

7. *Improving or modifying the Service's approach.* No suggestions needed.

8. *Appropriateness of name change.* I agree that the name of the listed entity should be changed *to Rana sevosa* following Young and Crother (2001). I think that the Service should use the standard common name dusky gopher frog for *R. sevosa*, however (Frost et al. 2008, p. 8). The proposed rule states that the Service will use Mississippi gopher frog to avoid confusion with populations of *R. capito* which some still call dusky gopher frog. I believe that using a nonstandard common name will engender more confusion than it alleviates.

Although Frost et al. (2008) use the genus *Lithobates* for the listed entity, I agree with the decision of the Service to retain *Rana* following Bossuyt et al. (2006).

Joseph H. K. Pechmann, Associate Professor Western Carolina University

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Image of Glen's Pond (Jan. 31, 2012)

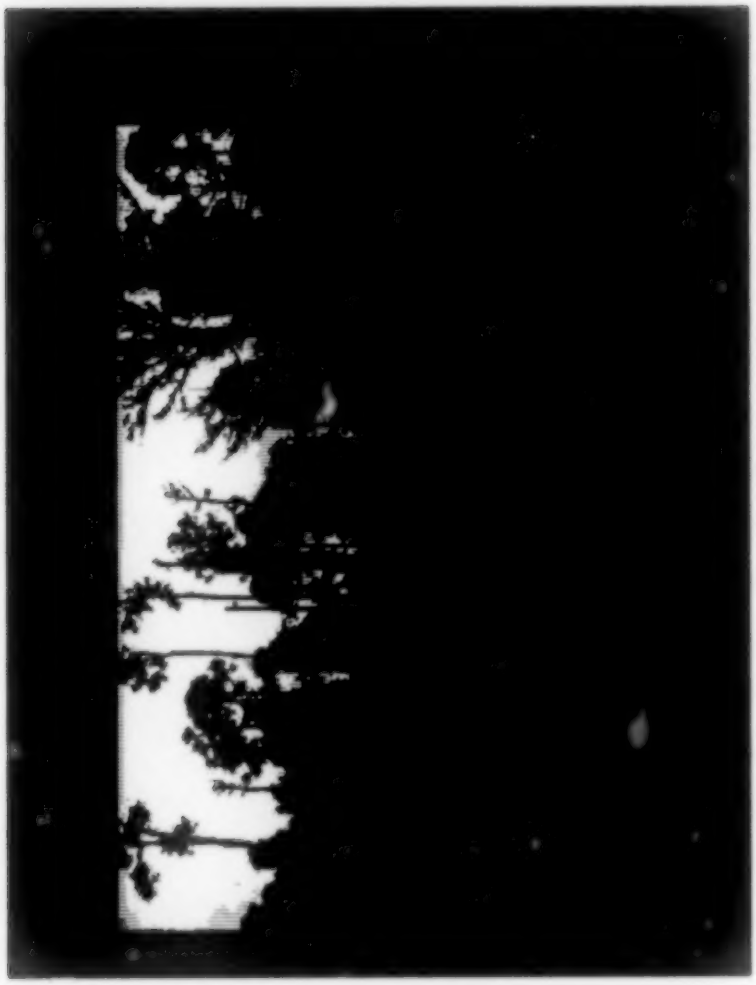
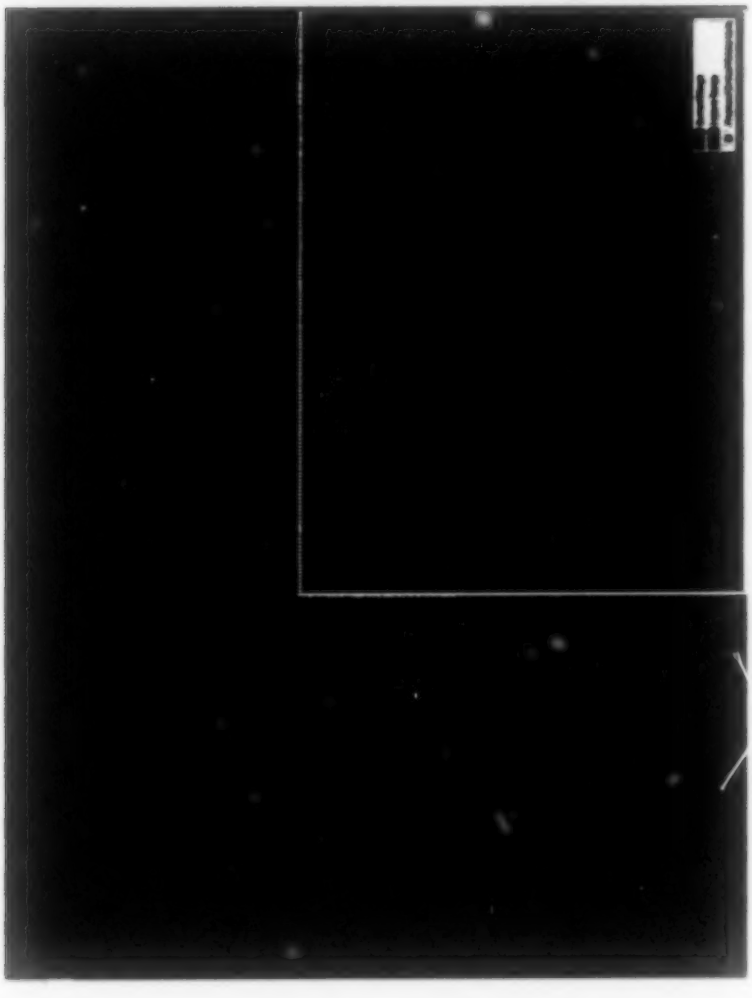


Image of Frog, Burrow, and Upland Pine Forest (Jan. 31, 2012)

Image of Current and Historic Range of Frog Habitat (Jan. 31, 2012)



Public Comment on Behalf of P&F Lumber (Feb. 28, 2012)

* * *

POSITIONS OF LANDOWNERS AND FWS

Simply put, the Proposed Rule boils down to whether the FWS should declare the Lands to be critical habitat for the MGF under the ESA, given the following:

1. The frog has not occupied or been seen on the Lands since at least 1 965.[1] The FWS admits this in the Proposed Rule.[2]

2. The frog will never be present on the Lands as the FWS cannot move the frog there and the Landowners will not allow them to be moved there, as the FWS will then require that the Lands be burned periodically to maintain the frogs' habitat.[3] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[4] Burning the Lands will also create a terrible potential for loss of life and injury as smoke and flames will drift onto LA Highway 36, which bisects the Lands. See also 66 FR 62999 where FWS says that " ... fire is the only

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[1] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 16 and 17.

[2] See, Proposed Rule at page 59783.

[3] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 5,6,8, 15 and 16, and Weyerhaeuser's comments of November 28, 2011.

[4] See, Proposed Rule at page 59783. See, Draft Economic Analysis page 4-3 ("The Service has indicated that in order to properly manage the breeding sites [on the Lands], prescribed burns would be necessary")

known management tool that will maintain [MGF habitat]." (Emphasis added).

3. Designating the Lands as critical habitat for the frog will utterly destroy all of the value of the Lands and Landowners' adjacent lands and will cost the Landowners at least $36.3 million.[5] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[6]

4. The Lands do not now, and will not in the future, contain the required "primary constituent elements" the FWS says are needed for the frog to live on the Lands.[7] The FWS admits this in the Proposed Rule. [8]

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In *United States v. Lopez*, 514 U.S. 549, 556-57, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995); the US Supreme Court defined the limits of the Commerce Clause by mandating that (i) Congress may only regulate an activity that "substantially affect(s)" interstate commerce, and (ii) there must be a rational basis for Congress' conclusion that the regulated activity sufficiently affects interstate commerce.

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[5] For detailed reasons on this point, sec Landowners' comments of November 23,2011 at pages 5, 6,9,10 and 19, and Weyerhaeuser's comments of November 28, 2011 at pages 13 and 14.

[6] See, Proposed Rule at pages 59789 and 509790. See, Draft Economic Analysis, Chapter 4.

[7] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 4, to, 11, 13,14, 15,and 18, and Weyerhaeuser's comments of November 28, 2011 at pages 4-9.

[8] FWS admits that the Lands do not "contain sufficient PCEs to support ... the [MGF]." 76 FR 59780. Also see proposed Rule at page 59777.

The Supreme Court has also clearly stated that the Commerce Clause cannot be extended to embrace effects upon interstate commerce that are merely indirect and remote. *NLRB v. Jones and Laughlin Steel*, 301 U.S. 1, 37, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

The FWS' attempt to regulate the "ecosystem" of the Lands in this wholly intrastate setting for the MGF, which has no known commercial, scientific, tourism, food, medical or other value, and where (as here) the MGF do not now and will not ever exist in the future, and where the elements of its critical habitat do not now exist and will not ever exist in the future, defies all logic and reason. Thus, the FWS' attempt to designate the Lands as critical habitat is plainly unconstitutional as it constitutes an attempt by the FWS to regulate a frog that does not occupy or exist on the Lands. The FWS goes beyond *Jones and Laughlin Steel's* "indirect and remote" standard of in this matter as it attempts to regulate nothingness and no commerce or commercial link to the Lands.

The FWS does not cite any link of any sort between the frog or the designation of the Lands as critical habitat to commerce of any nature whatsoever, be it travel, tourism, scientific research, or agriculture. Indeed, the FWS cannot do this because there is absolutely no such link and no commercial tie between the designation of the Lands as critical habitat under the ESA and the Commerce Clause. In turn, this means that the FWS' powers under ESA to designate the Lands as critical habitat do not pass constitutional muster.

Under the ESA there is no "market" at all for the MGF that applies to the Lands. Thus, this essential element necessary to justify exertion of the Com-

merce Clause power is missing. In this wholly intrastate context, as the frog is not present on the Lands and the frogs' habitat does not exist—and the FWS cannot "translocate the frogs to the Lands without the Landowners' approval (which they will not give) or recreate the frogs' habitat without the landowners' approval (which they also will not give)[9], the Proposed Rule neither has nor demonstrates any economic or commercial nexus to the Lands.

* * *

Endangered Species Act's Precarious Perch: A Constitutional Analysis Under The Commerce Clause And The Treaty Power, 27 Ecology L. Q. 215 (2000); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does The Endangered Species Act Encroach On Traditional State Authority And Exceed The Outer Limits Of The Commerce Clause?*, 36 Ga. L. Rev. 723 (Spring 2002).

[9] The Landowners will not do this for two primary reasons: (i) doing so will destroy the value of the lands and the value of the Landowners' adjacent lands due to habitat modification and required burnings to maintain it and (ii) as the FWs knows, the Lands are subject to a long-term timber lease with Weyerhaeuser expiring in 2043, under which Weyerhaeuser has the right to use the Lands exclusively to grow and harvest timber. The Landowners would thus breach the timber lease (and be required to pay damages for the breach) by turning the Lands over to support "translocated" frogs on the modified habitat. Both the habitat modification and the burnings would make the Lands wholly unusable and unsuitable for timber growing and harvesting

IEC Final Economic Analysis Report (Apr. 6, 2012)

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EXECUTIVE SUMMARY

1. The purpose of this report is to identify and analyze the potential economic impacts associated with the designation of critical habitat for the dusky gopher frog, also known as the Mississippi gopher frog (*Rana sevosa*, hereafter "gopher frog"). This report was prepared by Industrial Economics, Incorporated (IEc), under contract to the U.S. Fish and Wildlife Service (Service).

2. The gopher frog was listed as endangered on December 4, 2001.[1] On November 27, 2007, the Center for Biological Diversity and Friends of Mississippi Public Lands filed a lawsuit against the Service and the Secretary of the Interior for their failure to designate critical habitat for the frog in a timely manner.[2] In a settlement approved by the court on June 11, 2008, the Service agreed to submit to the Federal Register a proposed rule designating critical habitat for the gopher frog by May 30, 2010 if designation was found prudent and determinable. The proposed critical habitat designation was published on June 3, 2010.[3]

3. Based on information received during the comment period on the Proposed Rule, the Service revised the area proposed as gopher frog critical habitat to include additional area around the breeding

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[1] 66 FR 62993.

[2] Friends of Mississippi Public Lands and Center for Biological Diversity v. Kempthorne (07-CV-02073).

[3] 75 FR 31387.

ponds in Mississippi and the addition of a unit in Louisiana. The revised proposed critical habitat areas are described in the revised proposed critical habitat determination, which was published concurrently with the Notice of Availability (NOA) for the draft economic analysis.[4] These areas were further revised, the comment period was reopened, and a public hearing was announced on January 17, 2012. This revision decreased the area proposed as critical habitat to reflect a decreased maximum distance of gopher frog movement between breeding pods and upland habitat.[5] Since this publication, the Service has decreased the proposed critical habitat in Unit 10 by 54 acres to remove a portion of an agricultural field.[6] This analysis considers the economic effects of designating the proposed revised critical habitat as published on January 17, 2012 and including the reduction to proposed Unit 10 (the study area for this analysis).

4. The Service is proposing to designate a total of 6,477 acres across 12 units, three of which—Units 2, 4, and 5 are divided into two subunits—as gopher frog critical habitat. The proposed designation covers area in one Louisiana parish and four Mississippi counties: St. Tammany, LA (1,544 acres); Harrison, MS (1,655 acres); Jackson, MS (1,717 acres); Forrest, MS (598 acres); and Perry, MS (961 acres). Approximately 54 percent of the proposed critical habitat falls on Federally-owned land, 42 percent falls on private land, and the remaining 4 percent falls on

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[4] 75 FR 77817.

[5] 77 FR 2254.

[6] Personal communication with Service biologist, Jackson Field Office, March 16, 2012.

state-owned land. Occupied areas make up approximately 18 percent (1,197 acres) of the proposed designation. Occupied habitat for the gopher frog is limited to four areas: Subunit 2a located primarily within the DeSoto National Forest; Subunit 4a located on private land; Subunit 5a located on private land; and Unit 7 is located primarily within state-owned land held in trust as a local funding source for education in Jackson County. Unoccupied areas make up approximately 82 percent (5,280 acres) of the designation. The unoccupied proposed critical habitat falls within the historical range of the gopher frog.[7] Exhibit ES-1 provides an overview of proposed critical habitat for the gopher frog.

5. This final economic analysis analyzes the proposed designation as described in the proposed rule, with the changes noted above. This analysis does not reflect changes to the proposed critical habitat designation made in the final rule. Consequently, description of the habitat designation in the final rule may differ from maps and figures presented in this analysis.[8]

FOCUS OF THE ECONOMIC ANALYSIS

6. This analysis describes economic impacts to active species management, development, forestry, and military activities associated with designation of critical habitat for the gopher frog. To provide an understanding of the potential economic impacts, this analysis: 1) determines the scope and scale of eco-

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[7] Personal communication with Service biologist, Jackson Field Office, May 20, 2011.

[8] For a detailed discussion of public comments on the draft economic analysis and associated responses, refer to the responses to public comment section of the final rule.

nomic activities within proposed critical habitat; 2) identifies threats to gopher frog habitat associated with these economic activities; 3) identifies conservation measures that may be implemented to avoid or minimize these threats; and, 4) to the extent feasible, quantifies the economic costs of these measures.

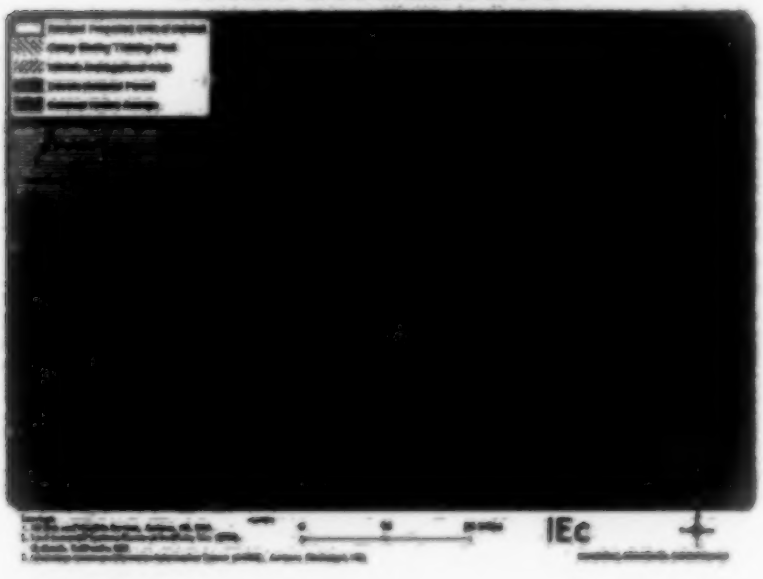
7. The analysis separates conservation measures into two distinct categories according to "without critical habitat" and "with critical habitat" scenarios. The "without critical habitat" scenario represents the baseline for the analysis, considering protections otherwise afforded to the gopher frog, for example under other Federal, State, and local regulations. The "with critical habitat" scenario describes the incremental impacts specifically due to designation of critical habitat for the species. In other words, these incremental conservation measures and associated economic impacts would not occur but for the designation. Economic impacts are only quantified for conservation measures implemented specifically due to the designation of critical habitat (i.e., incremental impacts). Conservation measures implemented under the baseline (without critical habitat) scenario are described qualitatively within the report, but economic impacts associated with these measures are not quantified.

8. This analysis considers both direct and indirect costs. Indirect costs may result from the influence of critical habitat designation on the decisions of regulators and decision-makers other than the Service (e.g., State agencies and land managers).

9. Because the Service believes that the direct benefits of the Proposed Rule are best expressed in biological terms, this analysis does not quantify or

monetize benefits. However, a qualitative discussion of economic benefits is provided in Chapter 5.

EXHIBIT ES-1 OVERVIEW
PROPOSED CRITICAL HABITAT FOR
DUSKY GOPHER FROG



SUMMARY OF FINDINGS

10. The following points summarize the key issues and conclusions of this report:

- **Present value incremental impacts are estimates to range from $102,000 to $34.0 million assuming a seven percent discount rate or $106,000 to $35.3 million assuming a three percent discount rate.** The reason for the broad range in incremental impacts stems from uncertainty regarding the likelihood of a Federal nexus for development activities in Unit 1 and the conservation measures that the Service may recommended

if consultation does occur. To address this uncertainty, we estimate potential economic impacts of designating Unit 1 as critical habitat according to three scenarios:

- **Scenario 1** – This scenario assumes that development occurring within the unit avoids impacts on jurisdictional wetlands. As such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding gopher frog critical habitat. Absent consultation, no conservation measures are implemented for the species and critical habitat designation of Unit 1 does not result in any incremental economic impact.
- Total present value incremental impacts of critical habitat designation of the remaining units are $102,000 ($9,610 in annualized impacts) over the timeframe of the analysis (2012 to 2031) applying a seven percent discount rate.
- **Scenario 2** – This scenario assumes the proposed development of Unit 1 requires a U.S. Army Corps of Engineers (Corps) Clean Water Act (CWA) Section 404 permit due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the gopher frog within the

unit. The Service anticipates that approximately 40 percent of the Unit may be developed in the case that 60 percent is managed for gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million.

- Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts) applying a seven percent discount rate.

- **Scenario 3** – This scenario again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million.

  Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts) applying a seven percent discount rate.

Incremental impacts stemming from additional gopher frog conservation measures requested by the

Service during section 7 consultation are not expected in occupied areas because project modifications that may be needed to minimize impacts to the species would coincidentally minimize impacts to critical habitat.[9] In unoccupied areas (e.g., Unit 1), project modifications resulting from consultation are considered incremental impacts of the critical habitat designation.[10]

- **According to Scenarios 2 and 3, the majority of incremental impacts are related to the lost development value in Unit 1.** Under Scenarios 2 and 3, as described above, over 99 percent of the estimate incremental impacts are related to the lost development value of Unit 1. Unit 1 is planned for large-scale, future development. The area is currently managed for timber, but was recently rezoned to allow for mixed-use and residential development. In the case that development within this unit is subject to section 7 consultation regarding gopher frog critical habitat, the Service will make conservation recommendations. Scenario 2 assumes that a compromise with the landowners will be reached in which development is avoided on 926 acres of the unit in order to provide for conservation and recovery of the species, while the remaining 618 acres is developed. Scenario 3 assumes complete avoidance of critical habitat

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[9] FWS to Industrial Economics, Inc., August 16, 2010, "Incremental Effects Memorandum for the Economic Analysis of Proposed Rule to Designate Critical Habitat for the Mississippi Gopher Frog." (see Appendix C)

[10] *Ibid.*

is necessary to avoid adverse modification of critical habitat. In the case that development of all or a portion of this unit is precluded due to the designation of critical habitat, incremental economic impacts are expected in the form of reduced land values. That is, the total value of the land would be reduced by the fraction of the value associated with the option for potential future development. Because this unit is unoccupied by the gopher frog, limitations on development would be attributable to the critical habitat designation alone and therefore would be considered incremental impacts.

- **Incremental impacts are also related to active species management activities.** Because the United States Forest Service (USFS) in Mississippi has been working closely with the Service for many years, many actions are already in place or underway for the gopher frog even absent critical habitat designation. These efforts fall under the baseline for this analysis and are not quantified. The quantified incremental impacts to species management are related to the administrative cost of addressing adverse modification in section 7 consultation. Three future consultations are expected related specifically to gopher frog and other species management efforts – these include a programmatic consultation for activities on lands managed by the USFS, a programmatic consultation for activities within Ward Bayou Wildlife Management Area (Ward Bayou WMA), and a reinitiation of consultation with the Natural

Resource Conservation Service for the Mississippi Healthy Forest Reserve Program. The present value of incremental impacts to species management is estimated to be $64,500, or $6,090 annualized over the analysis timeframe (2012 to 2031, applying a seven percent discount rate). Impacts related to species management activities represent roughly 0.2 percent of anticipated incremental impacts (discounted at seven percent).

- **Incremental impacts to military readiness could result from proposed critical habitat designation in Units 10, 11, and 12.** USFS lands proposed as critical habitat for the gopher frog in Units 10, 11, and 12 are used by the Mississippi Army National Guard under a special use permit as part of the Camp Shelby Joint Forces Training Center (Camp Shelby). This analysis assumes that USFS will engage in a programmatic consultation with the Service in 2012 to address issuance of the special use permit which authorizes training activities within the proposed critical habitat. Department of Defense (DOD) requests exclusion of these units given Camp Shelby's importance as a training facility for the Army National Guard, Army and other military services.
- **Outside of Unit 1, potential impacts to residential development activities are anticipated to be limited.** 59 acres of proposed critical habitat overlap a planning area for a large-scale development known as Tradition (in Subunits 2a and 2b). However, because the area is occupied by the species and

current plans appear to include leaving proposed critical habitat areas as wetlands/open space, it is not apparent that gopher frog critical habitat designation will result in a land use change at Tradition. Thus, this analysis assumes that while the Corps is expected to reinitiate consultation to address the potential for adverse modification of critical habitat on the gopher frog, no additional project modifications will result due to critical habitat. The analysis recognizes that a portion of unoccupied Unit 4 is currently used for rural residential development, and that some potential for future consultation exists in that area. However, no development plans are known at this time; therefore the analysis does not forecast potential impacts related to development in this unit.

- **A Habitat Conservation Plan (HCP) could be developed to address potential impacts of forestry activities on State School Lands.** Although normal silvicultural activities are exempt from section 404 permitting requirements, it is possible that the State of Mississippi, who own lands in Unit 7, could feel compelled to develop an HCP for their forestry activities following critical habitat designation. Although this unit is occupied by the gopher frog, this analysis assumes that critical habitat has the potential to trigger development of this HCP. Potential project modifications associated with this HCP are not known at this time, and hence are not quantified in this analysis.

INCREMENTAL IMPACTS OF GOPHER FROG CONSERVATION

11. Exhibit ES-2 summarizes incremental impacts of gopher frog conservation over the next 20 years (2012 to 2031) by unit and subunit. To calculate present value and annualized impacts, guidance provided by U.S. Office of Management and Budget (OMB) specifies the use of a real annual discount rate of seven percent.[11] In addition, OMB recommends conducting a sensitivity analysis using other discount rates, such as three percent.[12] Accordingly, all cost figures presented in Chapters 3 and 4 of this analysis describe present value cost impacts assuming a seven percent discount rate. Appendix B reports forecast impacts assuming a discount rate of three percent to highlight the sensitivity of the results to the discount rate assumption.

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[11] "A real discount rate that has been adjusted to eliminate the effect of expected inflation should be used to discount constant-dollar or real benefits and costs. A real discount rate can be approximated by subtracting expected inflation from a nominal interest rate... Constant-dollar benefit-cost analyses of proposed investments and regulations should report net present value and other outcomes determined using a real discount rate of 7 percent. This rate approximates the marginal pretax rate of return on an average investment in the private sector in recent years." U.S. Office of Management and Budget, Circular A-94 Revised, October 29, 1992.

[12] U.S. Office of Management and Budget, Circular A-4, September 17, 2003 and U.S. Office of Management and Budget, "Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations; Notice," 68 Federal Register 5492, February 3, 2003.

EXHIBIT ES-2 INCREMENTAL IMPACTS OF GOPHER FROG CONSERVATION BY UNIT AND SUBUNIT (2012 – 2031, 201 1 DOLLARS)

	SCENARIO 1	SCENARIO 2	SCENARIO 3	SCENARIO 1	SCENARIO 2	SCENARIO 3
1*	$0	$21,300,000	$34,300,000	$0	$20,400,000	$40,900,000
2a	$4,000			$3,080		
2b	$4,000			$3,080		
3	$8,700			$8,430		
4a	$0			$0		
4b	$0			$0		
5a	$7,280			$6,960		
5b	$7,280			$6,960		
6	$26,300			$25,300		
7	$4,410			$4,260		
8	$8,780			$8,430		
9	$8,780			$8,430		
10	$8,780			$8,430		
11	$8,780			$8,430		
12	$8,780			$8,430		
Total	$106,000	$21,300,000	$34,300,000	$102,000	$20,400,000	$40,900,000
Annualized	$7,110	$1,430,000	$2,300,000	$9,610	$1,930,000	$3,210,000

Notes: Totals may not sum due to rounding.
* This analysis employs three scenarios to estimate impacts of critical habitat designation in Unit 1 due to uncertainty regarding future land use and gopher frog conservation and recovery recommendations.

12. We estimate present value incremental impacts of critical habitat designation of $102,000, $20.5 million, or $34.0 million according to three scenarios (applying a seven percent discount rate). This equates to $9,610, $1.93, and $3.21 million in annualized impacts (applying a seven percent discount rate). Under Scenario 1 all incremental impacts stem from the administrative costs of future section 7 consultations. According to Scenarios 2 and 3, the vast majority of the incremental impacts stem from the lost development value of land in Unit 1. Less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations under Scenarios 2 and 3.

13. According to Scenario 1, the greatest incremental impacts are forecast to occur in Unit 6 where present value impacts are equal to $25,300 (24.8 percent of overall incremental impacts), applying a sev-

en percent discount rate. Under Scenarios 2 and 3, the greatest incremental impacts are forecast to occur within Unit 1 where present value impacts are equal to $20.4 million or $33.9 million, respectively (99.5 and 99.7 percent of overall incremental impacts), applying a seven percent discount rate. No incremental impacts are forecast in Subunits 4a and 4b.

14. Exhibit ES-3 presents present value and annualized incremental impacts by activity. According to Scenario 1, impacts to species management represent the majority (63.4 percent) of the total incremental impacts with a present value of $64,500 (applying a seven percent discount rate). Under Scenarios 2 and 3, impacts to development activities represent the majority (99.5 and 99.7 percent) of total incremental impacts with a present value of $20.4 million and $33.9 million (applying a seven percent discount rate).

EXHIBIT ES-3 PRESENT VALUE AND ANNUALIZED INCREMENTAL IMPACTS OF GOPHER FROG CONSERVATION BY ACTIVITY (2012 – 2031, 7 PERCENT DISCOUNT RATE, 201 1 DOLLARS)

	SCENARIO 1	SCENARIO 2	SCENARIO 3	SCENARIO 1	SCENARIO 2	SCENARIO 3
Species Management			$64,500			$6,090
Development	$7,710	$20,400,000	$33,900,000	$728	$1,920,000	$3,200,000
Forestry			$4,240			$400
Military			$26,300			$2,390
Total	$102,000	$20,500,000	$34,000,000	$9,610	$1,930,000	$3,210,000

Notes: Totals may not sum due to rounding.
* This analysis employs three scenarios to estimate impacts of critical habitat designation on development in Unit 1 due to uncertainty regarding future land use and gopher frog conservation and recovery recommendations.

KEY SOURCES OF UNCERTAINTY

- **Economic impacts in Unit 1:** The most significant source of uncertainty in this analysis is the economic impact of critical habitat designation on potential development activities in Unit 1. This unit is not occupied by the gopher frog and, consequently, impacts of future species conservation efforts are due to the critical habitat designation (i.e., are incremental impacts). The specific nature of the potential future use of this land proposed for critical habitat is uncertain. Due to regional development pressure, the current landowners plan to sell the land, currently managed for timber production, for residential and development (although the type, distribution, and timing of the ultimate development are uncertain at this time). The analysis quantifies the economic impact according to three possible future scenarios within this unit. The scenarios represent a range of possible impacts associated with no restrictions on land use in Scenario 1, to complete avoidance of development of the land in Unit 1 according to Scenario 3. Landowners anticipate the economic impact could be even greater in the case that other potential land uses, such as timber management or oil and gas development are restricted due to the designation of critical habitat. Exhibit 4-1 details the uncertainties associated with the evaluation of impacts of critical habitat designation in Unit 1.
- **Potential for additional conservation measures:** An additional source of uncertainty is the potential for the Service to request

additional conservation measures specifically to avoid adverse modification in future section 7 consultations. However, the Service does not anticipate additional conservation efforts for the frog in occupied areas, and many of the unoccupied areas are currently managed for the benefit of the gopher frog and its habitat. Therefore, incremental conservation efforts are expected to be most likely in unoccupied, privately-owned areas. Approximately 2,026 acres, or 31 percent of the proposed critical habitat area, is privately-owned and unoccupied. To the extent that the Service requests additional conservation measures to avoid adverse modification of critical habitat as part of consultations on future projects in unoccupied areas not managed for the gopher frog, this analysis underestimates incremental impacts.

- **Likelihood of consultation:** For most activities identified as occurring within critical habitat, this analysis conservatively assumes that consultation with the Service will occur. In some cases the Service may determine that the activity would not result in adverse modification and thus no consultation would be necessary. To the extent that future consultations are not necessary, this analysis overestimates incremental impacts.

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CHAPTER 4 | POTENTIAL ECONOMIC IMPACTS TO DEVELOPMENT, FORESTRY, AND MILITARY ACTIVITIES

67. This chapter discusses the potential incremental economic impacts of the proposed critical habitat designation for the gopher frog to development, forestry, and military activities. Total present value projected incremental impacts to these activities over the next 20 years is anticipated to range from $37,300 to $34.0 million ($3,520 to $3.21 million annualized), depending upon the scenario applied to estimate impacts to development activities in Unit 1. [75] Details on the projected incremental impacts to each of these three sectors are provided in Section 4.1 through 4.3. Results at the unit level are presented in Section 4.4.

68. Due to uncertainty regarding the ultimate scope and scale of potential future development in Unit 1, along with uncertainty regarding the conservation measures the Service may recommend to avoid destruction or adverse modification of critical habitat in this unit, this analysis estimates incremental impacts of critical habitat designation of Unit 1 according to three scenarios, as described in Section 4.1. These scenarios drive the range in estimated incremental impacts of the designation.

4.1 IMPACTS TO DEVELOPMENT ACTIVITIES

69. The Service has stated that development activities that disturb the soil and result in habitat fragmentation are considered a potential threat to

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[76] Using a seven percent discount rate.

the gopher frog and its habitat.[76] Residential or commercial development is forecast within proposed critical habitat Unit 1 and Subunits 2a and 2b (other than timber development, which is discussed separately). Units with lands potentially available for residential or commercial development are discussed below.

UNIT 1

70. Unit 1 is entirely privately-owned by a group on five landowners and Weyerhaeuser. Currently, this land is leased to Weyerhaeuser and managed for timber development (see Section 4.2).[77] The landowners began leasing their land to Weyerhaeuser's predecessor in 1953 and the current lease is set to expire in 32 years.[78] Approximately five years ago, the landowners entered into an understanding with Weyerhaeuser Real Estate Development Company (WREDCO) to jointly develop the land covered by the timber lease. The arrangement stipulates that the landowners contribute land and WREDCO contributes capital in a joint venture to develop the land when market conditions are amenable.[79] The current timber lease will be released once development occurs.[80,81] If the land is ultimately sold to a third par-

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[76] 75 FR 31393, 31400.

[77] A small portion of Unit 1 may be owned by Weyerhaeuser in fee (Written communication with Edward Poitevent, August 2, 2011).

[78] Written communication with Edward Poitevent, August 2, 2011.

[79] Personal Communication with Edward Poitevent, June 9, 2011.

[80] Email Communication with Edward Poitevent, June 9, 2011.

ty, the landowners and WREDCO have agreed upon a division of the monetary gains.[82]

71. St. Tammany Parish is a fast-growing area; according to the Louisiana State Census the population grew from 191,268 to 233,740, or 22 percent, between 2000 and 2010.[83] Growth in the Parish is projected to continue, reaching nearly 500,000 by 2030.[84] The area immediately surrounding the proposed critical habitat is experiencing particularly rapid growth. Within the last few years large warehousing facilities have been constructed or have begun construction in Pearl River.[85] A new high school was recently opened not far from the proposed critical habitat and major transportation infrastructure

[81] There remains significant uncertainty regarding the timing of potential development activities within Unit 1. A February 2012 article in the New Orleans Times-Picayune based on an interview with the landowner indicates that development of the unit would not occur until 2043, after the timber lease expires (Harvey, Christine. "Gopher frog habitat plans contested by St. Tammany Parish landowner" New Orleans Times-Picayune. February 1, 2012. Accessed by http://www.nola.com/poltics/index.ssf/2012/02/st_tammany_parish_landowner_fi.html on March 29, 2012).

[82] Written communication with Edward Poitevent, August 2, 2011.

[83] Demographics and Census Geography Louisiana State Census Data Center, accessed by http://louisiana.gov/Explore/Demographics_and_ Geography/ on June 29, 2011.

[84] Louisiana Population Projections, accessed by http://www.louisiana.gov/Explore/Population_Projections/ on June 29, 2011.

[85] For example, Rooms to Go opened a distribution and retail outlet in 2009 (http://neworleanscitybusiness.com/blog/2009/12/08/rooms-to-go-opens-50m-pearl-river-facility/) and Associated Wholesale Grocers, Inc. began construction on a distribution center in June 2011 (http://www.stedf.org/photos/130936241-4.pdf).

is planned in anticipation of continued rapid growth in the area.[86] In addition, infrastructure improvements have recently taken place on Highway 1088 between Interstate 12 and Highway 36, which runs through the proposed critical habitat.[87]

72. Over the last five years, the landowners and WREDCO have worked with the help of master planners Jordan, Jones & Goulding to rezone the area for development. Current zoning for the 1,544 acres falls within four zoning classifications: TND-2 (50 percent), A-3 (40 percent), A-4 (five percent), and A-2 (five percent).[88] These classifications are defined as follows:

- TND-2 Traditional Neighborhood Development Zoning District – compact mixed use development zone that includes residential, commercial, civic and open space;
- A-3 Suburban District – single-family residential zone with a maximum density of two units per acre;
- A-4 Single-Family Residential District – single-family residential zone with a maximum density of four units per acre; and

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[86] Email Communication with Edward Poitevent, June 9, 2011.

[87] Written communication with Edward Poitevent, August 2, 2011.

[88] *Ibid.*

- A-2 Suburban District – single-family residential district with a maximum density of one unit per acre.[89]

73. The landowners and WREDCO have invested a significant amount of time and dollars into their plans to develop this area.[90] Because Louisiana Highway 36 runs through the proposed critical habitat unit, the area is particularly attractive for development. Development plans for this area are currently delayed due to the recession and the negative real estate bank-lending environment. Recently, the landowner indicated that development may not occur until 2043, which is beyond the 20-year timeframe of this analysis.[91] Nevertheless, we assume that any reduction in land value occurring due to the designation of critical habitat will happen immediately at the time of the designation (the time at which the restriction is considered enforceable).

74. If the development plans do move forward, a section 404 Army Corps permit may be necessary and therefore consultation with the Service regarding effects on the proposed critical habitat will likely be required.[92] If development avoids jurisdictional

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[89] St. Tammany Parish Government, Unified Development Code – Volume 1 (Zoning), accessed by http://www.stpgov.org/departments_planning_unified.php on June 20, 2011.

[90] Email Communication with Edward Poitevent, June 9, 2011.

[91] Harvey, Christine. "Gopher frog habitat plans contested by St. Tammany Parish landowner" New Orleans Times-Picayune. February 1, 2012. Accessed by http://www.nola.com/politics-/index.ssf/2012/02/st_tammany_parish_landowner_fi.html on March 29, 2012.

[92] Personal Communication with Edward Poitevent, June 9, 2011.

wetlands, section 7 consultation would not be required due to the absence of a Federal nexus.

75. The Service has indicated that in order to properly manage the breeding sites within Unit 1, prescribed burns would be necessary. Development would make burning more problematic, but not impossible. If this area is developed, burns would likely be less frequent than without development.[93] During consultation, the Service strives to work with Federal action agencies and landowners to minimize the impacts of a particular action. In this case, if the landowners agree to allow the Service to re-introduce the gopher frog in a portion of the unit, the Service anticipates the remainder would be available for development activities. Specifically, the Service indicates that protecting 60 percent (or 926 acres) of the proposed critical habitat in Unit 1 would provide a meaningful conservation benefit to the gopher frog.[94] Therefore, development of 618 acres (40 percent) within Unit 1 with 926 acres of the unit managed for the conservation and recovery of the species would avoid adverse modification of critical habitat. The Service anticipates that such a compromise is the most likely outcome of section 7 consultation regarding proposed development activities within the Unit.[95]

76. Under the most conservation assumption (e.g., most likely to overstate rather than understate

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[93] Email Communication with U.S. Fish and Wildlife Service biologist, July 29, 2011.

[94] Email Communication with U.S. Fish and Wildlife Service biologist, August 122011.

[95] Personal Communication with U.S. Fish and Wildlife Service, August 11, 2011.

impacts) regarding the outcome of section 7 consultation, the Service would recommend complete avoidance of development within Unit in order to avoid adverse modification of critical habitat.

77. Due to uncertainty regarding the likelihood of a Federal nexus and the conservation measures that would be recommended during consultation, we evaluate impacts of critical habitat designation on development activities in Unit 1 according to the following three scenarios:

- **Scenario 1** – This scenario assumes that development occurring within the unit avoids impacts on jurisdictional wetlands. As such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding gopher frog critical habitat.
- **Scenario 2** – This scenario assumes the proposed development of Unit 1 requires a Corps CWA Section 404 permit due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the gopher frog within the unit, resulting in 40 percent of the Unit being developed and 60 percent managed for gopher frog conservation and recovery.
- **Scenario 3** – This scenario again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the im-

portance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit.

78. According to Scenarios 2 and 3, the economic impact of critical habitat designation is the lost development value of lands within the unit on which development is precluded. Note that the total value of the land would not be lost, as there is some value associated with timber production and other potential land uses.[96]

79. We do not expect that designation of critical habitat in Unit 1 will have a significant impact on regional real estate demand and supply dynamics. The economic impacts are likely to extend beyond the regulated landowners and affect the real estate market, real estate consumers, and the regional economy if: (1) the amount of land not developed as a result of gopher frog protection is high relative to the total developable land in the region; or (2) other project modification costs are high relative to real estate development value and cover a significant proportion of developable land. In these cases, landowners and developers may pass on the costs to real estate consumers in the form of high prices.

80. Conversely, if project modification costs are low or if gopher frog protection only affects a small fraction of the total developable land supply in a region, then economic effects are likely to be limited to

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[96] In general, normal silvicultural activities are exempt from section 404 permitting requirements. Therefore, consultation with the Service under section 7 of the Act is not necessary and timber harvests will not be affected by the designation. Impacts to forestry activities are discussed in more detail in Section 4.2.

that subset of individual landowners or projects. This analysis estimates that up to 1,544 acres of developable land will be affected by the critical habitat designation. This acreage represents approximately 0.5 percent of the total amount of developable land within St. Tammany Parish.[97] As area within the proposed critical habitat designation represents a small percentage of total developable lands within the Parish, we expect a reduction in the regional supply of housing is unlikely.

81. The current landowners are concerned that, in addition to limiting development, critical habitat designation will restrict all future uses of the land, including timber management and hunting.[98] However, critical habitat only affects activities with a Federal nexus, as described in Chapter 2 of this report. As such, absent Federal funding, permitting, or

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[97] We estimate the amount of developable land in St. Tammany Parish using the latest land cover data available. Developable land is defined as land classified as cultivated, deciduous forest, evergreen forest, grassland, mixed forest, pasture, hay and scrub/shrub. Wetlands, water, and lands already developed are not considered developable land. Furthermore, protected lands are not considered developable land (NOAA Coastal Change Analysis Program (C-CAP) Land Cover and Change Data [landcover_la_noaa_2005.tif] Available online at http://lagic.lsu.edu/loscoweb/. Accessed March 29, 2012; U.S. Geological Survey Protected Areas Database 1.2, 2011).

[98] The landowner has also expressed concern that burning of these lands may occur due to the critical habitat designation and that these burns will be incompatible with any future land uses (Written communication with Edward Poitevent, August 2, 2011). Critical habitat designation does not allow the Service to require burning of land parcels. Absent section 7 consultation (which is not required for private activities on private lands) the Service cannot prescribe burning of private critical habitat lands.

oversight, certain future uses of the land would not be precluded. For example, timber management activities, such as are currently occurring on these lands, are exempt from Corps regulation under Section 404 of the CWA, and thus are not subject to Federal funding or permitting. Consequently, critical habitat does not provide the Service with regulatory authority regarding critical habitat for the gopher frog with respect to this activity. We therefore do not expect that critical habitat designation would affect timber management activities in Unit 1. Similarly, hunting activities are unlikely to affect the critical habitat for the gopher frog and are not subject to a Federal nexus triggering section 7 consultation. As such, hunting activities are not expected to be affected by critical habitat designation for the gopher frog in Unit 1.

82. The landowners of Unit 1 have also expressed interest in developing the land for oil and gas. Oil and gas activities are potentially subject to a Federal nexus if a Corps CWA Section 404 Permit is required. St. Tammany and adjacent Parishes contain Tuscaloosa marine shale.[99] Recent consultation with a geologist has shown that Tuscaloosa Marine Shale exists within proposed critical habitat Unit 1.[100] Landowners indicate that a geologist recently determined that there may be 20 million bbls or recoverable oil within the landowners' total land area. Approximately 3.5 percent of the landowners' land overlaps the 1,544 acres within the unit. As noted above,

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[99] Chacko, John J. et al., An Unproven Unconventional Seven Billion Barrel Oil Resource – the Tuscaloosa Marine Shale, Basin Research Institute, Louisiana State University.

[100] Written communication with Edward Poitevent, August 2, 2011.

the landowners are concerned that the Service may restrict the use of the land for oil and gas development, resulting in further impacts (above and beyond losses associated with residential and commercial development restrictions).

83. In many cases, impacts of oil and gas exploration and development on habitats may be avoided by implementing conservation efforts such as directional drilling to avoid surface disturbance. These conservation efforts, however, would result in some incremental operational costs even in the case that oil and gas development is not precluded. It is therefore possible that, in the case oil and gas development occurs on this land, and a Federal nexus is present triggering section 7 consultation, that there may be economic impacts of critical habitat designation for the gopher frog on this activity. We do not quantify these impacts due to considerable uncertainty surrounding the likelihood, timing, and extent of oil and gas development within Unit 1 over the foreseeable future.

84. While we do not anticipate that all economic activities would be precluded on these land (i.e., timber management and hunting are unlikely to be affected and potential impacts on oil and gas development activities are uncertain), the value of the land associated with the option for future development may be lost in a portion of Unit 1 under Scenario 2, and all lands within Unit 1 according to Scenario 3. Because the unit is unoccupied, costs associated with project modifications implemented to avoid adversely modifying critical habitat would be attributable to the critical habitat designation (i.e., incremental impacts).

85. We apply the following information to quantify the economic impact of restricting development within Unit 1 due to critical habitat designation:

- The number of acres within the unit that may be targeted for development absent the designation of critical habitat;
- The number of acres within the unit where development would be restricted;
- Market values of comparable land parcels subject to similar types of development opportunity for which restrictions on future development do not exist; and
- The current value of this land for its other potential future uses (e.g., timber management, oil and gas development, recreation, etc.).

86. This analysis assumes that, absent critical habitat designation, the entire area within proposed critical habitat Unit 1 will be subject to future development. According to Scenario 2, development will be restricted on 926 acres. According to Scenario 3, development will be restricted within the entire unit (1,544 acres). Adjacent land with comparable zoning has been proposed for sale to Central Louisiana Electric Company for $23,500/acre.[101] This value does not include the value of the standing timber, as Weyerhaeuser maintains the lease for the timber. This value is used to approximate the per acre value of the land for future development in proposed critical habitat Unit 1. As the exact uses of the sale parcel compared to the proposed critical habitat parcel are uncertain, the value is not a perfect proxy for develop-

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[101] Written communication with Edward Poitevent, August 2, 2011.

ment value of the critical habitat acres. For example, the sale parcel may have more or less oil and gas potential, or may be more or less desirable for future development. This would affect the relative value of the parcels. However, the market value of nearby comparably zoned parcels currently represents the best available information of the potential development value of the critical habitat lands.

87. We multiply the per-acre development value by the total number of acres within critical habitat that may not be developed due to the gopher frog critical habitat designation. Assuming substitute land is available to developers, existing landowners bear the full burden of the costs of gopher frog development restrictions in the form of lower land values. This reduction in land value occurs immediately at the time of designation of critical habitat (the time at which the restriction is considered enforceable); therefore, this analysis assumes the land value loss occurs in 2012. In addition, under Scenarios 2 and 3 the administrative cost of a new consultation considering only adverse modification will occur in 2012. Accordingly, the total incremental impacts to development activities in Unit 1 are anticipated to be:

- **Scenario 1** – Absent consultation, no conservation measures are implemented for the species and critical habitat designation of Unit 1 does not result in any incremental economic impact.
- **Scenario 2** – According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million ($1.92 million in annualized impacts).

- **Scenario 3** – According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million ($3.20 million in annualized impacts).[102]

88. As noted above, the loss in Scenarios 2 and 3 reflect only the lost development value of the land. The extent to which future oil and gas activities may also be affected by critical habitat designation of this unit is unknown. Exhibit 4-1 presents these key uncertainties and the potential bias they introduce in the evaluation of the incremental impacts of critical habitat designation in Unit 1.

EXHIBIT 4-1. KEY UNCERTAINTIES ASSOCIATED WITH THE ESTIMATED INCREMENTAL IMPACTS OF CRITICAL HABITAT DESIGNATION FOR THE GOPHER FROG IN UNIT 1

SOURCE OF UNCERTAINTY	DIRECTION OF POTENTIAL BIAS	LIKELY SIGNIFICANCE WITH RESPECT TO ESTIMATED IMPACTS
We apply the market value of a comparable parcel of vacant, developable land ($23,500/acre) as a proxy for the option value of future development on the critical habitat lands.	May overestimate or underestimate incremental impacts	Potentially major. The option value for future development, which is what is lost when development is precluded on a parcel, is unknown for these lands. Applying market values of similarly zoned adjacent parcels may overestimate the value of the land for future development to the extent that the market values incorporate values of the future use of the land other than for development (e.g., future oil and gas development or recreational use values). The market value may also overestimate the develop-

[102] Development loss impacts in Scenarios 2 and 3 are calculated by multiplying 926 and 1,544, respectively, by $23,500 per acre (totaling $21.8 million and $36.3 million, respectively), discounted one year at seven percent.

		ment value of the critical habitat acres to the extent that the sale parcel is more attractive for potential future development than the critical habitat parcel. On the other hand, the market value may underestimate the development value of the critical habitat lands to the extent that the critical habitat lands are more desirable for future development activity.
The landowners anticipate that, due to the presence of Tuscaloosa Marine Shale, oil and gas extraction may occur in the future absent critical habitat designation. The landowners suggest that the value of this activity within critical habitat would be $17.1 million in market value for the potentially discoverable oil, plus an additional $164,900 to $247,350 in minerals bonus.**	Likely leads to an underestimate of incremental impacts	Potentially major. Approximately 700,000 barrels of oil are predicted to exist within the shale of proposed Unit 1.* In the case that critical habitat designation precludes oil and gas development activities, the landowners suggest the market value of the oil and the minerals bonus are losses. First, it is uncertain whether the Service would preclude oil and gas activities within the critical habitat area. It may be that the activities could proceed with some modification (e.g., implementing directional drilling). In this case, the value of the land associated with potential future oil and gas development would not be lost. Second, the market value of the oil does not represent an economic impact to the landowners as it is not net of the costs of exploration and extraction that would be incurred if the area were to be developed. To the extent that oil and gas development activities are affected by critical habitat designation, however, this analysis underestimates potential economic impacts associated with critical habitat designation in Unit 1.
We assume all land within proposed critical habitat Unit 1 may be developed within the next 30 years.	Unlikely to affect the results of the analysis.	No effect. We account for various scopes of development according to the three scenarios, which results in a range of impacts from zero to full loss of development value.

SOURCE OF UNCERTAINTY	DIRECTION OF POTENTIAL BIAS	LIKELY SIGNIFICANCE WITH RESPECT TO ESTIMATED IMPACTS
The landowners suggest that the value of the timber on these lands is $3.96 million (the value of the standing timber) and an additional $1.98 million to $2.97 million associated with timbering the land for the remainder of the lease term.	Unlikely to affect the results of the analysis.	No effect. This analysis does not anticipate that timber management of these lands will be affected by critical habitat designation for the gopher frog. This activity does not involve a Federal nexus and is not expected to be subject to section 7 consultation.
The landowners suggest that revenue from hunting leases on the critical habitat lands contributed $9,844 per year.	Unlikely to affect the results of the analysis.	No effect. This analysis does not anticipate that hunting on these lands will be affected by critical habitat designation for the gopher frog. This activity does not involve a Federal nexus and is not expected to be subject to section 7 consultation.
Notes and Sources: *Based on an estimate of 20 million barrels of oil on 43,500 acres – the 1,544 acres within Unit 1 represent 3.5 percent of this area (Written communication with Edward Poitevent, August, 2, 2011). **Written communication with Edward Poitevent, August, 2, 2011.		

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CHAPTER 5 | POTENTIAL ECONOMIC BENEFITS

5.1 INTRODUCTION

107. There are two types of economic benefits that result from the proposed critical habitat designation: direct benefits and ancillary benefits. The primary intended benefit of critical habitat (i.e., the direct benefit) is to support the conservation of threatened and endangered species, such as the gopher frog. Thus, attempts to develop monetary estimates of the benefits of this proposed revised critical habitat designation would likely focus on the public's willingness to pay to achieve the conservation benefits to the gopher frog resulting from this designation.

108. Quantification and monetization of species conservation benefits would require information on the incremental change in the probability of gopher frog conservation that is expected to result from the designation. No studies exist that provide such information for this species. Furthermore, there is no published valuation literature to support monetization of such changes for this species.

109. Numerous published studies estimate individuals' willingness to pay to protect endangered species.[119] The economic values reported in these studies reflect various groupings of benefit categories (including both use and non-use values). For example, these studies assess public willingness to pay for wildlife-viewing opportunities, for the option for seeing or experiencing the species in the future, to as-

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[119] See, for example, Loomis, J.B. and Douglas S. White. 1996. Economic Benefits of Rare and Endangered Species: Summary and Meta-Analysis. Ecological Economics, 18(3): 197-206.

sure that the species will exist for future generations, and simply knowing a species exists, among other values. Unfortunately, this literature addresses a relatively narrow range of species and circumstances compared to the hundreds of species and habitats that are the focus of the Act. Specifically, existing studies focus almost exclusively on large mammal, bird, and fish species, and generally do not report values for incremental changes in species conservation. Importantly for this analysis, we are not aware of any published studies that estimate the value the public places on preserving the gopher frog.

110. Other ancillary benefits may also be achieved through designation of critical habitat. For example, the public may hold a value for habitat conservation, beyond its willingness to pay for conservation of a specific species. Studies have been done that estimate the public's willingness to pay to preserve wilderness areas, for wildlife management and preservation programs, protection of open space and ecosystem maintenance. These studies address categories of benefits (e.g., ecosystem integrity) that may be similar to the types of benefits provided by critical habitat, but do not provide values that can be used to establish the incremental values associated with this proposed critical habitat designation (i.e., the ecosystem and species protection measures considered in these studies are too dissimilar from the habitat protection benefits that may be afforded by this designation).

111. Similarly, economists have conducted research on the economic value of open space. Open space can provide aesthetic benefits, with subsequent positive impacts on property values in the surrounding community. Such benefits are not the purpose of critical habitat designation. In addition, ap-

plying this literature would involve transferring research results from other parts of the country and other contexts to Mississippi and Louisiana and the specific context of this rulemaking. More importantly, it is not possible to estimate the likelihood that open space will be preserved as a result of this proposed designation. Thus, because open space preservation is not the goal of the designation, and because it is not possible to determine the probability that such benefits will occur in this instance, the Service has decided not to include such estimates in the Economic Analysis. The remainder of this chapter includes a qualitative benefits discussion, summarizing the gopher frog conservation efforts described in Chapters 3 and 4 of this report and linking them with potential categories of economic benefit that may derive from their implementation.

5.2 POTENTIAL BENEFITS OF GOPHER FROG CONSERVATION

112. This section describes the categories of benefits potentially resulting from gopher frog conservation efforts within the study area. As described in Chapters 3 and 4, the only additional conservation effort anticipated to be undertaken incrementally as a result of critical habitat designation for gopher frog is the avoidance of development in Unit 1. The remainder of the quantified incremental costs is limited to the administrative effort associated with future consultations. Therefore, ancillary benefits are only anticipated related to the avoidance of development in Unit 1. The following categories of benefits may derive from conservation efforts in Unit 1:

- **Property value benefits:** Open space or decreased density of development **resulting**

from gopher frog conservation may increase adjacent or nearby property values.

- **Aesthetic benefits: Social** welfare gains may be associated with enhanced aesthetic quality of habitat. Preferences for aesthetic improvements may be measured through increased willingness-to-pay to visit a habitat region for recreation or increased visitation.
- **Ecosystem services benefits:** Decreased development may lead to protection and improvement of water quality and preservation of natural **habitat** for other species.

113. In addition to these categories of potential benefit, avoidance of development in Unit 1 related to the broader conservation and recovery of the species. All conservation efforts therefore relate to the maintenance or enhancement of the use and non-use value (e.g., existence value) that the public may hold specifically for the gopher frog. Further, many of the conservation efforts undertaken for the gopher frog may also result in improvements to ecosystem health that are shared by other, coexisting species. The maintenance or enhancement of use and non-use values for these other species, or for biodiversity in general, may also result from these gopher frog conservation efforts.

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Federal Register Final Rule
77 Fed. Reg. 35118 (June 12, 2012)

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17
[Docket No. FWS-R4-ES-2010-0024;
4500030114]

RIN 1018-AW89

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog)

AGENCY: Fish and Wildlife Service, Interior.
ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, designate critical habitat for the dusky gopher frog under the Endangered Species Act. In previous publications, we used the common name "Mississippi gopher frog" for this species. We are taking this action to fulfill our obligations under the Act. Land in St. Tammany Parish, Louisiana, and Forrest, Harrison, Jackson, and Perry Counties, Mississippi, is being designated under a court approved settlement agreement to finalize critical habitat for the species. The effect of this regulation is to conserve the habitat upon which dusky gopher frog depends.

DATES: This rule becomes effective on July 12, 2012.

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SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act, we are required to designate critical habitat for any endangered or threatened species if prudent and determinable and we must issue a rule to designate critical habitat. Designation of critical habitat for the dusky gopher frog was found to be prudent and a proposed rule to designate critical habitat was published on June 3, 2010. We subsequently reproposed critical habitat on September 27, 2011, and announced the availability of an economic analysis. Pursuant to a court-approved settlement agreement, we must deliver to the **Federal Register** our final designation of critical habitat for the dusky gopher frog on or before May 30, 2012. This action fulfills our obligations under the Act and the settlement agreement.

This rule designates critical habitat for the dusky gopher frog.

- Approximately 625 hectares (1,544 acres) are designated as critical habitat in St. Tammany Parish, Louisiana.
- Approximately 1,996 hectares (4,933 acres) are designated as critical habitat in Forrest, Harrison, Jackson and Perry Counties, Mississippi.
- In total, approximately 2,621 hectares (ha) (6,477 acres (ac)) are designated as critical habitat for the dusky gopher frog.

Peer reviewers support our methods. We solicited expert opinions front seven knowledgeable individu-

als with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from six of the peer reviewers. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications and suggestions to improve the final critical habitat rule.

Background

It is our intent to discuss in this final rule only those topics directly relevant to the development and designation of critical habitat for the dusky gopher frog under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*). For more information on the biology and ecology of the dusky gopher frog, refer to the final listing rule published in the **Federal Register** on December 4, 2001 (66 FR 62993). For additional information on dusky gopher frog critical habitat, refer to the revised proposed rule to designate critical habitat for the dusky gopher frog published in the **Federal Register** on September 27, 2011 (76 FR 59774) and the announcement of the public hearing for the revised proposed rule published in the **Federal Register** on January 17, 2012 (77 FR 2254).

Taxonomy and Nomenclature

Subsequent to the listing of the dusky gopher frog (=Mississippi gopher frog), taxonomic research was completed that indicated that the entity (which we listed as a DPS of the dusky gopher frog (*Rana capito* [sic] *sevosa*)) is different from other gopher frogs and warrants acceptance as its own species (Young and Crother 2001, pp. 382-388). The herpetological scientific community accepted this taxonomic change and the scientific name for the species was

changed to *Rana sevosa*. In addition, all comments on taxonomy that we received during the comment periods for the revised critical habitat proposal were in agreement that the frog warrants acceptance as its own species. Therefore, listing as a DPS is no longer appropriate. The taxonomic change meant that a change in the common name from Mississippi gopher frog to dusky gopher frog was appropriate (Crother *et al.* 2003 , p. 197). Most comments we received on this subject indicated that we should change the common name to dusky gopher frog from Mississippi gopher frog. Therefore, although in the revised proposed critical habitat rule (76 FR 59774) we stated that we would continue to use the common name "Mississippi gopher frog" we now believe the common name dusky gopher frog should be used to describe the listed species rather than Mississippi gopher frog and, in this rule, we use the common name "dusky gopher frog" for this species.

We received other comments on changes that have been proposed in the scientific literature regarding removing the genus name *Rana* from a group of North American frogs and replacing it with the genus *Lithobates* (*see* Crother 2008, p. 7). There is still reluctance by some in the scientific community to accept this change (Hillis 2007, p. 331 ; Pauly *et al.* 2009, p. 115: Wiens *et al.* 2009, p. 1220). Until there is a clear consensus within the scientific community, we will continue to use the scientific name of *Rana sevosa* for the dusky gopher frog.

Previous Federal Actions

The dusky gopher frog was listed as an endangered species under the Act on December 4, 2001 (66 FR 62993). The species was at that time identified as the Mississippi gopher frog, *Rana capito*

sevosa, a distinct population segment of the dusky gopher frog (*Rana capito*) (see Taxonomy and Nomenclature discussion above). At the time of listing, the Service found that designation of critical habitat was prudent. However, the development of a designation was **[35,119]** deferred due to budgetary and workload constraints.

On November 27, 2007, the Center for Biological Diversity and Friends of Mississippi Public Lands (plaintiffs) filed a lawsuit against the Service and the Secretary of the Interior for our failure to timely designate critical habitat for the dusky gopher frog (*Friends of Mississippi Public Lands and Center for Biological Diversity v. Kempthorne* (07–CV–02073)). In a court-approved settlement, the Service agreed to submit to the **Federal Register** a new prudency determination, and if the designation was found to be prudent, a proposed designation of critical habitat by May 30, 2010, and a final designation by May 30, 2011. Designation of critical habitat for the dusky gopher frog was again found to be prudent, and a proposed rule to designate critical habitat for the dusky gopher frog was published on June 3, 2010 (75 FR 31387).

During the comment period for the June 3, 2010, proposed rule, the peer reviewers and other commenters indicated their belief that the amount of critical habitat proposed was insufficient for the conservation of the dusky gopher frog and that additional habitat should be considered throughout the historic range of the species. Specifically, information was provided that pointed to limitations in the data we used to determine the size of individual critical habitat units and that there was additional habitat in Louisiana that would aid in the conservation of dusky gopher frogs. Based on this new information,

we asked the plaintiffs to agree to an extension of the deadline that was established by the original settlement. Plaintiffs agreed, and in a modification to the original settlement signed on May 4, 2011, the court agreed to the Service's timeline to send a revised proposed critical habitat rule to the **Federal Register** by September 15, 2011, and a final critical habitat rule to the **Federal Register** by May 30, 2012. A revised proposed critical habitat rule was published in the **Federal Register** on September 27, 2011 (76 FR 59774) and replaced our June 3, 2010 (75 FR 31387), proposed critical habitat rule in its entirety.

Summary of Comments and Recommendations

We requested written comments from the public on the revised proposed designation of critical habitat for the dusky gopher frog during two comment periods. The first comment period, associated with the publication of the revised proposed rule and notification of the availability of the associated draft economic analysis (76 FR 59774), opened on September 27, 2011 and closed on November 28, 2011. The second comment period, associated with a public hearing held on January 31, 2012, in Gulfport, Mississippi, opened on January 17, 2012 and closed on March 2, 2012. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties, and invited them to comment on the revised proposed rule and draft economic analysis during these comment periods.

During the first comment period, we received 46 comment letters directly addressing the revised critical habitat designation or the draft economic analysis. During the second comment period, we received 57 comment letters directly addressing the revised proposed critical habitat designation or the draft

economic analysis. During the January 31, 2012, public hearing, 19 individuals or organizations made comments on the proposed designation. All substantive information provided during comment periods has either been incorporated directly into this final determination or is addressed in our responses below. Public comments we received were grouped into six general categories.

Peer Review

In accordance with our peer review policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we solicited expert opinions from seven knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from six of the peer reviewers.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding critical habitat for the dusky gopher frog. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

Comment 1: All peer reviewers agreed that although *Rana capito sevosa* was listed as a distinct population segment of *Rana capito* the listed entity has now been accepted by the scientific community as a unique species, *Rana sevosa*. All but one of the peer reviewers agreed with our proposed change of

the common name of the listed entity from Mississippi gopher frog to dusky gopher frog. Two of the peer reviewers suggested changing the scientific name of *Rana sevosa* to *Lithobates sevosus* based on recent publications in the scientific literature. However, one of these peer reviewers stated that although the four major herpetological societies require authors submitting papers to their publications to use the standard English names of Crother (2008, p. 8) (=dusky gopher frog], authors may use their discretion on the scientific name used (within scientific reason and with citation when needed).

Our Response: See "Taxonomy and Nomenclature" above. The Service is changing the name of the listed entity to *Rana sevosa*, the dusky gopher frog. However, because disagreement exists in the scientific community regarding the taxonomic support for replacing *Rana* with *Lithobates*, the Service believes it is not yet appropriate to make this change for the listed entity.

Comment 2: All of the peer reviewers agreed that it was appropriate that the Service had increased the size of the critical habitat units in the September 27, 2011 revised proposed rule. Nevertheless, there was some disagreement among the peer reviewers about whether the increase was adequate for the conservation of the dusky gopher frog, and this was reflected in their comments regarding the methods used to define the individual units. All of the peer reviewers approved of combining the maximum distance movements of the two species of gopher frogs for use in the determination of the size of individual critical habitat units; however, two of the peer reviewers, and others, provided specific comments on our use of these data. The comments included: Combining movement data from studies of the same population;

deleting anecdotal observations from single frogs not incorporated into larger studies; using the mean rather than the median to calculate the value used to define the area around each breeding pond; and increasing the area of critical habitat beyond the value calculated from the movement data to account for areas of poor upland habitat quality. One peer reviewer stressed the need to maximize the size of critical habitat units due to the uncertainty of habitat suitability when creating circular areas of protection and due to the reduction in dusky gopher frog genetic variability resulting from the species' habitat isolation and small population size.

Our Response: In our January 17, 2012, publication (77 FR 2254), we reopened the comment period and **[35,120]** announced a public hearing on the revised proposed critical habitat designation. We also proposed changes in the data analysis that had been used in creating the critical habitat units in the revised proposed rule, and requested comments on these changes. The changes included combining movement data from individual sites and removing one anecdotal gopher frog movement record from our maximum distance dataset. The Service did not receive any comments on these changes from peer reviewers or the public. We continue to believe, as was expressed by one of the peer reviewers, that the use of the median distance value in our calculations is more appropriate than using the mean. The use of the mean would yield a higher value because the maximum distance values are skewed toward larger values and the mean is more influenced by these values when compared to the median. To illustrate the possible bias in using the mean rather than the median, one reviewer pointed out that the greatest maximum distance movement was on a site where

burrow habitat in the uplands was severely limited and the frogs had to move long distances to find appropriate fossorial (underground) habitat. We believe the use of the median long distance movement value provides a better estimate of central tendency in our dataset, and we consider its use more appropriate than the mean. The Service agrees that there are likely differences in habitat suitability in the various critical habitat units, and we have tried to account for that by using the median maximum distance value, plus a buffer, in calculating the area to include in critical habitat surrounding each occupied or unoccupied breeding pond (see "*Criteria Used To Identify Critical Habitat*" below).

Comments From States

Section 4(i) of the Act states, "the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition." The only comment received from a State agency was from an employee of a State agency that was a peer reviewer of the revised proposed rule. This comment was in support of the revised proposal as written.

Public Comments

General Comments Issue 1: Critical Habitat Delineation Methodology

Comment 3: If the delineation of critical habitat for the dusky gopher frog is based on the best available science, there is no biological reason to include movement data from other gopher frogs (*Rana capito*) and not include movement data from crawfish frogs (*R. areolata*). The two gopher frog species and crawfish frogs share derived morphological and behavioral characters that separate them from all oth-

er frog species. One of their shared behavioral traits is an affinity for small terrestrial cavities.

Our Response: The two species of gopher frogs (*Rana capito* and *R. sevoso*) share similar habitat within different geographic areas of the longleaf pine ecosystem in the southeastern United States. As adults, all gopher frogs occupy below-ground habitat within the forested uplands, typically stump holes, small mammal burrows, and when they are available, gopher tortoise burrows. Crawfish frogs occur outside the range of gopher frogs and are distributed to the east and west of the Mississippi River in an arc from the eastern Gulf Coast of Texas north to southern Iowa, Illinois, Indiana, and Kentucky, and south across western Tennessee, north and central Mississippi, and northeastern Louisiana (Parris and Redmer 2005, p. 526). Crawfish frogs occupy a wide variety of habitats including open wet woodlands, wooded valleys, prairies, river floodplains, pine forest, wet pastures, and grasslands (Parris and Redmer 2005, p. 527). Adult crawfish frogs use fossorial habitats, commonly occupying abandoned crayfish burrows (Parris and Redmer 2005, p. 527). Although adult dusky gopher frogs also use fossorial habitats (abandoned mammal burrows, stump holes), the Service considers the differences in geography and habitat between the two species to be too great to include crawfish frog movement data in our critical habitat calculations.

Comment 4: The amount of area designated as critical habitat around occupied or unoccupied dusky gopher frog breeding ponds should be increased. One commenter requested a general increase in area only around the four occupied sites. Another commenter wanted the Service to go back to using a 650-m (2,133-fl) radius around all sites as was used to con-

struct critical habitat units in our September 27, 2011, revised proposed rule (76 FR 59774). In addition, that commenter requested the radius be increased to 1,000 m (3,281 ft) around Glen's Pond when constructing the critical habitat unit at that site.

Our Response: see Section "*Criteria Used To Identify Critical Habitat*" below for a discussion of our rationale for constructing individual critical habitat units. The Service used the best available scientific information on gopher frog movements to quantify the areas we are designating as critical habitat. We have found no scientific justification for using a larger radius when constructing some units over others. In the future, if such data become available, under the authority of section 4(a)(3)(A)(ii) the Secretary could revise the designation, as appropriate.

General Comments Issue 2: Procedural and Legal Issues

Comment 5: The Endangered Species Act and the proposed designation of critical habitat are unconstitutional and the Service lacks authority to regulate the dusky gopher frog under the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution. The U.S. Supreme Court defined the limits of the Commerce Clause by mandating that (i) Congress may only regulate an activity that "substantially affect(s)" interstate commerce, and (ii) there must be a rational basis for Congress' conclusion that the regulated activity sufficiently affects interstate commerce. The Service did not cite any link whatsoever between the designation of critical habitat for the frog and commerce, be it travel, tourism, scientific research, or agriculture. Designation of critical habitat will "result in a significant impinge-

ment of the States' traditional and primary power over land and water use" and this effective control is not justified because there is no Federal interest in regulation of interstate commerce relative to the dusky gopher frog.

Our Response: The constitutionality of the Act in authorizing the Services' protection of endangered and threatened species has consistently been upheld by the courts. see, *e.g.*, *GDF Realty Investments, Ltd.* v. *Norton*, 326 F .3d 622 (5th Cir. 2003); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000); *National Association of Homebuilders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Rancho Viejo* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003); and *United States* v. *Hill*, 896 F. Supp. 1057 (D. Colo. 1995). The courts have held that regulation under the Act to protect species that live only in one State is within Congress' Commerce Clause power and that loss of animal diversity has a substantial effect on interstate commerce. *National Ass'n of Home Builders*, 130 F.3d at 1050-51; see *Rancho Viejo*, 323 F.3d at 310, n. 5. Thus, although the dusky gopher frog is currently known to occur only within the State of Mississippi, the Service's application of the Act to designate critical habitat for this species is constitutional. **[35,121]**

Comment 6: Designation of private property as critical habitat constitutes a "taking" of private property under the 5th Amendment of the U.S. Constitution by depriving landowners of the economically beneficial use of their land. As a result of the designation, the property will be pressed into "public service" without compensation to the landowners.

Our Response: The Service analyzed the potential takings implications of designating critical habitat

for the dusky gopher frog and included this analysis in our administrative record. Determining whether a constitutional taking will occur is a matter for the courts. However the process is generally fact-specific and involves weighing the character of the government action, the economic impact of that action, and the reasonableness of the property owner's investment-backed expectations. We have identified two "taking" scenarios that are relevant to the designation of critical habitat. The first is a physical taking when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a practical ouster of the owner's possession. The proposed designation of critical habitat for the dusky gopher frog would not result in physical occupation or invasion of private property. On non-Federal lands, activities that lack Federal involvement, such as timber management and oil and gas extraction, would not be affected by the critical habitat designation. However, a second scenario concerns activities of an economic nature that are likely to occur on non-Federal lands in the area encompassed by this designation, and where Federal involvement may occur, and includes construction of utilities, residential or commercial development, and road construction and maintenance. This second scenario is where a regulation may potentially deny all economically beneficial or productive use of land, commonly referred to as a categorical taking. However, the mere promulgation of a regulation designating critical habitat does not on its face deny property owners all economically viable use of their land. The Act does not automatically restrict all uses of lands that have been designated as critical habitat, but only imposes restrictions under section 7(a)(2) on Federal agency actions that may result in destruction or adverse modification of criti-

cal habitat. Furthermore, as discussed above, if a biological opinion concludes that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to suggest reasonable and prudent alternatives to the action that would avoid the destruction or adverse modification of critical habitat. Such alternatives must be economically, as well as technologically, feasible (50 CFR 402.02).

Comment 7: The Service has no delegated authority to regulate or confiscate private land.

Our Response: When prudent, the Service is required to designate critical habitat under the Act. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation (see further explanation under Comment 6 above).

Comment 8: The Service did not comply with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*). The Ninth Circuit's holding that NEPA does not apply to critical habitat designations rested in part on supposition that the action at issue does not alter the natural, untouched physical environment at all. Therefore, as maintenance of critical habitat requires special management, which can be interpreted as human interference with the environment, a NEPA review is required.

Our Response: Environmental assessments and environmental impact statements, as defined under NEPA, are not required for regulations enacted under section 4 of the Act (see 48 FR 49244, October 25, 1983). The Service has determined that, outside of the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, a NEPA analysis is not required for critical habitat designation.

The fact that a physical or biological feature requires special management considerations or protection to meet the definition of "critical habitat" does not mean that the designation of critical habitat would include "special management" requiring active maintenance or any other form of human interference with property. In the case of unoccupied habitat, the "physical/biological features/special management" part of the definition simply does not apply. Thus, the designation of critical habitat does not constitute the sort of human interference that would require a NEPA analysis.

Comment 9: In order to determine what is "essential to the conservation of the species," the Service must first identify "the point" when the species will no longer be "endangered" or "threatened". That point can be identified only if the Service has determined a viable population size and the minimum habitat necessary to sustain that population. These threshold determinations are missing from the proposed rule. The failure to articulate a basis for designating each unit as critical habitat is a violation of the law that must be corrected.

Our Response: During the process of developing a recovery plan, as required by Section 4(f) of the Act, the Service determines the threshold that must be met to establish when a species is no longer "endangered" or "threatened". The Service has not yet completed a recovery plan for the dusky gopher frog, and thus, this threshold has not been defined. However, the Act does not require that recovery criteria be established as a precondition to designating critical habitat. Section 3(5)(A) of the Act defines the term "critical habitat" as (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * * on which are found those physi-

cal or biological features essential to the conservation of the species and which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination that such areas are essential for the conservation of the species. The Act does not provide additional guidance on how to determine what habitat is essential for the conservation of the species, nor does it require a minimum population and habitat viability analysis for critical habitat designation. In this case, the Secretary has discretion in determining what is essential for the conservation of a species. The Service has studied the one dusky gopher frog population known at the time of listing to determine the habitat attributes essential to the conservation of the species, and determined that the primary constituent elements (PCEs) specific to the dusky gopher frog are: (1) Ephemeral wetland habitat (PCE 1); (2) upland forested nonbreeding habitat (PCE 2); and (3) upland connectivity habitat (PCE 3) (see "*Criteria Used To Identify Critical Habitat*" below). With regard to units/subunits not known to be occupied at the time of listing, we have determined that these areas are essential to the conservation of the dusky gopher frog because this species is at high risk of extirpation from stochastic events, such as disease or drought, and from demographic factors such as inbreeding depression. The establishment of additional populations beyond the single site known to be occupied at listing is critical to protect the species from extinction and provide for the species' eventual recovery. **[35,122]**

Therefore, the Service believes that all the areas designated as critical habitat meet the definition under section 3(5)(A) of the Act. If the Service gains

knowledge of additional areas that meet the definition of critical habitat, then under section 4(a)(3)(A)(ii) of the Act, the Secretary may revise the designation, as appropriate. The Service has articulated a basis for designating each unit as critical habitat under the individual unit descriptions in Final Critical Habitat Designation.

Comment 10: The Service has failed to meet the "prudent and determinable" standard of section 4(a)(3) of the Act. In fact, the Service was required to immediately "find" critical habitat for the dusky gopher frog as a result of a court settlement with the Center for Biological Diversity.

Our Response: see "*Previous Federal Actions*." The dusky gopher frog was listed as an endangered species under the Act on December 4, 2001 (66 FR 62993), and at that time the Service found that designation of critical habitat was prudent. On November 27, 2007, the Center for Biological Diversity and Friends of Mississippi Public Lands (plaintiffs) filed a lawsuit against the Service and the Secretary of the Interior for our failure to timely designate critical habitat for the dusky gopher frog. In a court-approved settlement, the Service agreed to submit to the **Federal Register** a new prudency determination, and if the designation was found to be prudent, a proposed designation of critical habitat by May 30, 2010, and a final designation by May 30, 2011. A new prudency determination was included in our proposed rule to designate critical habitat for the dusky gopher frog published on June 3, 2010 (75 FR 31387). Based on new scientific information we received during the comment period for this proposed rule, the Service requested and received a modification to the settlement agreement, signed on May 4, 2011. The Service complied with the settlement agreement and

made another prudency determination in our revised proposed rule to designate critical habitat for the dusky gopher frog (76 FR 59774, September 27, 2011) which replaced the 2010 proposed rule in its entirety. Thus, the settlement agreement did not force the Service to "find" critical habitat for the dusky gopher frog, but rather complete a new prudency determination and only proceed with a proposed, and ultimately, a final designation of critical habitat if deemed prudent.

Comment 11: The Service did not contact all landowners potentially affected by the proposed designation of critical habitat.

Our Response: The Act requires that we publish the proposed regulation in the **Federal Register**, give actual notice of the proposed regulation to each affected state and county (i.e., those in which the species is believed to occur), appropriate professional organizations, and publish a summary of the proposed regulation in a newspaper of general circulation in each area of the U.S. where the species is believed to occur. It also requires that we promptly hold one public hearing if any person files a request within 45 days of the publication (in the **Federal Register**). When we were able to identify the landowners of a proposed critical habitat unit, we contacted them directly. In addition, we attempted to ensure that as many people as possible would be aware of the revised proposed critical habitat designation, draft economic analysis, and public hearing by issuing press releases to all major media in the affected area, submitting newspaper notices for publication within areas of revised proposed critical habitat, and directly notifying affected State and Federal agencies, environmental groups, State Governors, Federal and State elected officials, and county com-

missions. We accepted comments from September 27, 2011, through November 28, 2011, and from January 17, 2012, through March 2, 2012, for a total of 105 days. We sent out notifications of the second comment period to commenters from the first comment period when they had supplied their contact information. By these actions, we have complied with or exceeded all of the notification requirements of the Act and the Administrative Procedure Act (5 U.S.C. subchapter II).

Comment 12: One commenter expressed opposition to Federal acquisition of 16th Section land unless the land is purchased at full replacement value or fair market lease without loss and hardship to schools and without increasing local homeowners' tax burden to recoup the losses from such a transaction.

Our Response: Designation of critical habitat on land does not constitute "Federal acquisition" of that land. The Service has no plans to acquire ownership of any land designated as critical habitat. The commenter referred to "16th section" lands. This designation is based on the original surveys of the country in the late 1700's when land was systematically surveyed into square townships, 9.656 km (6 miles) on a side. The townships were subdivided into 36 sections of 2.59 km^2 (1 mi^2). Section 16 in each township was reserved for the maintenance of public schools. This system remains in place in Mississippi and funds derived from "16th section" lands are used to support county funding for public schools. Our intention is to work with existing landowners, including the State of Mississippi, which owns 16th Section lands, to further the recovery of the dusky gopher frog.

Comment 13: Critical habitat designation may limit conservation actions in other areas.

Our Response: The Service will work on actions to support the recovery of the dusky gopher frog wherever possible, including outside the geographic area designated as critical habitat.

General Comments Issue 3: Critical Habitat Designation on Private Land—General

Comment 14: Critical habitat designation on private land will prevent future timber management and development within the designated area. Property owners within one mile of critical habitat could be affected by the designation. Private property owners will be burdened with consultation under section 7 of the Act as a result of the critical habitat designation. The Service should restrict critical habitat on private land to landowners that voluntarily participate in the recovery of endangered and threatened species.

Our Response: The selection of sites to be included in critical habitat is based, first and foremost, on the needs of the species. Before we determine land ownership, we consider what is needed for species conservation based on the best available scientific and commercial information. This ensures that the best locations to support species' conservation are identified and increases awareness among all potential partners of the best known sites to support the conservation of the species.

The designation of critical habitat does not impose a legally binding duty on private parties. Activities that do not involve a Federal agency, Federal action, Federal funding, or Federal permitting, will be unaffected by the designation of critical habitat. Private land use activities, such as farming and silviculture, would be unaffected. Federal activities, or actions permitted, licensed, or funded by Federal agencies, will require consultation with the Service if they

are likely to adversely modify critical habitat. Consultation is a process by which Federal agencies use the Service's expertise to evaluate the potential effects of a proposed action on species listed under the Act and their critical habitats. The Service works with Federal agencies to identify alternatives where activities or projects may proceed **[35,123]** without adverse modification to critical habitat. For example, if private landowners wish to develop their property and are required by the U.S. Army Corps of Engineers (Corps) to obtain a wetlands dredge and fill permit, this would trigger consultation under section 7 of the Act between the Corps and the Service if critical habitat is designated on the property; however, the Service would work with the Corps to identify strategies to avoid adverse modification of critical habitat. Based on our experience with section 7 consultations for other listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. Reasonable and prudent alternatives must, by definition, be economically feasible and within the scope of authority of the Federal agency involved in consultation.

If there is no activity on private property involving a Federal agency, Federal action, Federal funding, or Federal permitting, participation in the recovery of endangered and threatened species is voluntary. Critical habitat designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species. There is no effect to landowners whose property is outside the specific area designated as critical habitat, no matter the ownership (see response to Comment 6).

General Comments Issue 4: Critical Habitat Designation on Private Land—Louisiana

Comment 15: The dusky gopher frog has not been seen in Louisiana since 1965, and the habitat designated as Critical Habitat Unit 1 (Unit 1) has none of the primary constituent elements (PCEs) described in the revised proposed rule; the ponds in Unit 1, in their present condition, do not constitute suitable dusky gopher frog habitat under the definition of PCE 1. Although the Service's interest in Unit 1 is caused in part by the perceived difficulty in establishing ephemeral ponds for the dusky gopher frog, artificial ponding has supported gopher frog reproduction. Unit 1 will never have PCEs due to on-going timber management of the site, which precludes burning or planting longleaf pine trees to improve the upland habitat for the gopher frog. The dusky gopher frog will never be present on site because the landowners object to moving them there. The Service cannot designate critical habitat on the grounds that the PCEs will be present in the future.

Our Response: The site in Louisiana identified as Unit 1 contains at least two historic breeding sites for the dusky gopher frog. Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed. For such areas, which are outside the geographical area occupied by a species at the time it is listed, section 3(5)(A)(ii) of the Act requires simply that critical habitat be designated based on a determination that such areas are essential for the conservation of the species. Due to the importance of ephemeral ponds to the recovery of the dusky gopher frog (see "*Criteria Used To Identify Critical Habitat*"), the Service determined that the area of Unit 1 is essential for the conservation of the dusky gopher frog. The only pond occupied at the

time of listing is being designated and we determined that this one location is not sufficient to conserve the species. Additional areas that were not known to be occupied at the time of listing are essential for the conservation of the species. Although the presence of the PCEs is not a necessary element for this determination, the Service believes Unit 1 contains the PCE described as Primary Constituent Element 1—Ephemeral wetland habitat (see Section "*Primary Constituent Elements for the Dusky Gopher Frog*") based on the best available data, which include the visits made to the site by Service personnel and other gopher frog experts. During these visits, the Service assessed the habitat quality of ephemeral wetlands in this area and found that a series of five ponds contained the habitat requirements for PCE 1 (see response to Comment 16 below).

The Service is aware borrow pits and other sites constructed by man have been used for breeding by other species of gopher frogs outside the range of the dusky gopher frog. Nevertheless, these sites need to contain the same features that are present in natural ponds in order for them to provide the proper environment for successful development of metamorphic dusky gopher frogs. Ephemeral, isolated ponds are very difficult to establish in the landscape due to their short and specific hydrology. The ponds have to hold water long enough to allow for tadpole development and metamorphosis, but if they hold water too long they become permanent ponds and no longer have value for ephemeral pond-breeding amphibians. The U.S. Forest Service, in cooperation with the Service and our partners, constructed a pond on the DeSoto National Forest with the goal of creating a dusky gopher frog breeding site. It has taken 10 years to reach the point where we consider this pond

ready to be used as a reintroduction site, and its value as a breeding site has not yet been proven. It is highly unlikely that five ponds, similar to those that currently exist in Unit 1, could be created in the landscape within a timeframe that would provide near-term conservation benefits to the dusky gopher frog.

During the process of delineating critical habitat, the Service assesses habitat to determine if it is essential for the conservation of a listed species. Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there. According to the landowners, the timber lease on their property does not expire until 2043. The Service has a number of tools, such as habitat conservation plans, that could be used to formalize the timber management goals of the landowners and work towards recovery of the dusky gopher frog. There are also programs, such as the Healthy Forests Initiative administered through the U.S. Department of Agriculture's Natural Resources Conservation Service, that provide funding to private landowners for habitat management. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.

Comment 16: The Service has not provided sufficient support for the argument that Unit 1 is "essential for the conservation" of the dusky gopher frog, only a "more is better" statement that Unit 1 pro-

vides additional habitat for population expansion. "Essential for conservation of the species," the standard for designating critical habitat on unoccupied sites, is a more exacting standard than that for determining critical habitat designation of occupied habitat. The Act requires a demonstration that the designation of unoccupied habitat is essential for conservation, not essential to decreasing the risk of extinction of the species. The Service must provide a factual basis supporting the conclusion that Unit 1 is essential to recovery of the dusky gopher frog.

Our Response: The scientific peer reviewers that responded to our original proposed critical habitat rule were **[35,124]** united in their assessment that this proposal was inadequate for the conservation of the dusky gopher frog and that we should look within the species' historic range outside the state of Mississippi for additional habitat for the designation. As a result of the peer review, we conducted a reanalysis of current and historic data for the species, including data from Alabama and Louisiana, to determine if we could find additional habitat that would meet the definition of critical habitat (see Comment 17, below, for discussion of habitat in Alabama). As a result of the rarity of open-canopied, isolated, ephemeral ponds within the historic range of the dusky gopher frog, and their importance to survival of the species, identifying more of these ponds was the primary focus of our reanalysis (see *"Criteria Used To Identify Critical Habitat"*, below).

The Service visited the area designated as Unit 1 in St. Tammany Parish, Louisiana, in 2011. We conducted a habitat assessment in this specific area because at least two historic breeding ponds for the dusky gopher frog occur there, including the one where the species was last seen in 1965. We deter-

mined that five isolated, ephemeral wetlands in that area are similar to ponds where dusky gopher frogs currently breed in Mississippi. The five ponds are in close proximity to each other, which provides metapopulation structure and increases the unit's value to the long-term survival and recovery of the frogs over an area with a single breeding pond (see "Space for Individual and Population Growth and for Normal Behavior", below).

The role of critical habitat is to support the life-history needs of the species and provide for conservation. Conservation is defined in section 3(3) of the Act as the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary (recovery). Recovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery. Based on the best scientific information available to the Service, the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog.

The isolated populations of the dusky gopher frog face many threats, including droughts and disease. These environmental and biological threats are likely to occur at the same time at sites near each other. Habitat in Louisiana is distant from the extant populations of the dusky gopher frog. For this reason, the Louisiana site would likely be affected by different environmental variables than sites in Mississippi. Thus, Unit 1 provides a refuge for the frog should the

other sites be negatively affected by environmental threats or catastrophic events. An example of one of these threats is climate change. Climate change will undoubtedly affect amphibians throughout the world in the coming decades (Lawler *et al.* 2010, p. 38). For species such as the dusky gopher frog, one of the greatest threats posed by climate change is water availability. The amount and timing of precipitation can have dramatic effects on ephemeral breeding ponds, resulting in mortality of eggs and larvae. In addition, post-metamorphic survivorship may be reduced by increased desiccation risk. Dusky gopher frogs will be susceptible to the effects of rapid climate change due to their limited natural ability to move through the landscape, and habitat fragmentation. Hydrological changes to ponds at the currently occupied sites could mean extinction for this species. The designation of critical habitat, and the creation of new populations of dusky gopher frogs through reintroductions, should give the species better odds of survival and recovery given the threats posed by climate change.

In summary, the Service believes Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Comment 17: The site in Louisiana (Unit 1) was chosen without regard to available habitat for the dusky gopher frog in Alabama. Alabama contains

habitat that provides more of the PCEs needed for the dusky gopher frog to survive than in Unit 1, and the Service provided no assertion that Alabama ponds are not essential for the conservation of the dusky gopher frog. The standard the Service applied to designating critical habitat areas was that they would provide "additional habitat" and this standard could just as easily be applied to Alabama as to Louisiana. Nevertheless, critical habitat may only include areas "essential to the conservation of the species." The Service's failure to apply a consistent or correct standard for determining critical habitat is arbitrary and prohibited by the Administrative Procedure Act.

Our Response: Peer reviewers of our original proposed rule indicated that critical habitat for the dusky gopher frog in the proposal (76 FR 59774, September 27, 2011) was inadequate for the conservation of the dusky gopher frog. Thus, the Service conducted a habitat reassessment, which included areas outside of Mississippi that are within the species' historic range in Louisiana and Alabama (see Comment 16 and "*Criteria Used To Identify Critical Habitat*", below). In Alabama, the only record for the dusky gopher frog, as currently described, is from 1922 at a location in Mobile County near Mobile Bay. The upland terrestrial habitat at this site has been destroyed and replaced by a residential development (Bailey 1994, p. 5). A breeding site that might have been used by these frogs has never been found. Two remote sensing studies (Hart 2004, pp. 1–9: Bailey 2009, pp. 1–14) have been conducted to search for ponds and terrestrial habitat that might support dusky gopher frog populations. Those ponds identified using aerial photography which were visited did not contain habitat that provides a conservation benefit for dusky gopher frogs. Habitat was poor because

of a number of factors which limited its suitability for dusky gopher frogs. For example, ponds contained woody shrubs and trees, were occupied by fish, occurred within agricultural fields, and/or were surrounded by trailers and houses (Hart 2004, pp. 8–9). As there are no data supporting the occurrence of historic or current dusky gopher frog breeding sites in Alabama, nor any habitat of a quality certain to support conservation of the frog, the Service could not identify areas in Alabama that we believed essential for the conservation of the species in Alabama (see "*Criteria Used To Identify Critical Habitat*", below). The Service does not have data, nor did any commenter provide data, to support the assertion that habitat in Alabama provides more of the PCEs needed for the dusky gopher frog to survive than in Unit 1.

Comment 18: Unit 1 is not "essential" to the survival of the frog because most of the proposed critical habitat occurs on the DeSoto National Forest where the frogs can thrive.

Our Response: Critical habitat is a conservation tool. Conservation measures are a means to reach recovery and the point at which the measures provided under the Act are no longer necessary. This is a broader standard than simply survival and requires the Service to designate critical habitat that will support recovery of the species. DeSoto National Forest (DNF) represents only one area of the historic distribution of the dusky gopher frog. Although DNF is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution. Critical habitat will support recovery of the dusky gopher frog by protecting

sites across a large area of the species' historic range and providing space for population expansion, including in areas that will provide protection from the effects of local catastrophic events. See also our response to Comment 16.

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General Comments Issue 6: Science

Comment 20: The Service failed to consider sound science when developing the revised proposed rule. The designation of Unit 1 as critical habitat is deeply flawed for scientific reasons and violates the Presidential Memorandum of Scientific Integrity. The agency actions for this designation are wholly devoid of sound science and undermine public trust.

Our Response: Comments questioning aspects of the methodology and data used in our revised proposed designation of critical habitat for the dusky gopher frog have been addressed above under Comments 2, 3, 4, 8, 15, 16, 17, and 18. Scientific peer review of our revised proposed rule supported the science that we used in developing the document. The commenter did not provide specifics about why the Service might be in violation of the President's March 9, 2009, Memorandum concerning Scientific Integrity; however, as illustrated below, we believe our rulemaking meets the standards set forth in the President's memorandum.

In accordance with section 4 of the Act, we are required to use, and we used, the best available scientific and commercial information to make this critical habitat decision. Further, we followed the criteria, established procedures, and guidance from our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Regis-**

ter on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554: H.R. 5658)), and our associated Information Quality Guidelines.

In order to meet these "best available scientific and commercial information" standards, we found information from many different sources, including articles in peer-reviewed journals, scientific status surveys and studies, other unpublished materials, and experts' opinions or personal knowledge. Also, in accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. Additionally, we requested comments or information from other concerned governmental agencies, the scientific community, industry, and other interested parties concerning the revised proposed rule. We accepted comments during two open comment periods for a total of 105 days. All of the comments and information we received were considered in finalizing this critical habitat designation for the dusky gopher frog. All the supporting materials used for the final rule, including literature cited and comments from the public and peer reviewers, were made available for public inspection at the Web site: *http://www.regulations.gov.*

In conclusion, we believe that we have used the best available scientific and commercial information for the designation of critical habitat for the dusky gopher frog, in compliance with the Act and in accordance with the President's March 9, 2009, Memo-

randum concerning Scientific Integrity (see Critical Habitat). **[35,126]**

General Comments Issue 7: Economic Analysis

Comment 21: Two commenters state that the estimated $36.2 million impact to development activities in proposed Unit 1 should be attributed to that unit and not viewed as an economic impact of the entire 7,015-acre proposed critical habitat area.

Our Response: Exhibit ES–2 in the draft economic analysis (DEA) presents the incremental impacts of gopher frog conservation by unit and subunit. The impacts presented in this exhibit were revised in the final economic analysis (FEA) due to the reduction in acreage proposed in the **Federal Register** on January 17, 2012 (77 FR 2254). The FEA's Exhibit ES–2 includes incremental impacts attributable to the areas within proposed Unit 1 ranging from $0 to $33.9 million (assuming a 7 percent discount rate). This range reflects uncertainly regarding future land use and gopher frog conservation and recovery recommendations in Unit 1. These impacts are described further in the text following this exhibit (paragraphs 12 and 13 in the FEA's Executive Summary), where the FEA notes that "under scenarios 2 and 3, the greatest incremental impacts are forecast to occur within Unit 1 where present value impacts are equal to $20.4 million or $33.9 million, respectively (99.5 and 99.7 percent of overall incremental impacts), applying a seven percent discount rate." Also refer to the "*Economic Analysis*" section of this rule.

Comment 22: Multiple commenters assert that controlled burns necessary to properly manage habitat for the gopher frog within proposed Unit 1 will imperil homes and businesses in the vicinity. The commenters note that such burnings may halt devel-

opment of adjacent lands resulting in the loss of revenue to the landowners and tax revenue to St. Tammany Parish and the State of Louisiana. In addition, burnings are a safety hazard for drivers along LA Highway 36, which runs through proposed critical habitat Unit 1.

Our Response: In paragraph 78, the DEA acknowledges landowner concern that burning may lead to negative impacts in proposed Unit 1. However, as explained in footnote 76, critical habitat designation does not allow the Service to require burning of land parcels. If activities undertaken in Unit 1 have a Federal nexus (as assumed in scenarios 2 and 3 in the DEA), the Service may request burning through the section 7 consultation. Burning would be undertaken by experts following the issuance of a permit based on environmental conditions. In particular, wind conditions are considered when issuing a burning permit to ensure that smoke will not drift onto other properties or across roads. There is considerable uncertainty surrounding the frequency of future burns that may be requested by the Service and whether these burns would lead to any economic impacts; therefore incremental impacts associated with burns are not quantified in the DEA.

Comment 23: One commenter describes the potential for oil and gas development in Unit 1 and questions why the DEA does not quantify economic impacts for oil and gas activities. In particular, the commenter indicates that consultation on oil and gas development activities under section 7 of the Act would lead to negative economic impacts. The commenter concludes that the DEA ignores the negative economic impact of consultation on oil and gas activities and is therefore fatally flawed.

Our Response: Paragraph 79 of the DEA summarizes the potential for economic impacts to oil and gas activities in proposed Unit 1. The DEA concludes that it is possible that "in the case oil and gas development occurs on this land, and a Federal nexus is present triggering section 7 consultation, that there may be economic impacts of critical habitat designation for the gopher frog on this activity." As summarized on pages ES–4 and ES–5, the DEA assumes that a Federal nexus is present under scenarios 2 and 3 because of the need for a Corps Clean Water Act Section 404 permit. The DEA assumes that there is no Federal nexus triggering section 7 consultation under scenario 1. Despite the fact that the DEA assumes a Federal nexus is present under scenarios 2 and 3, and the DEA indicates that economic impacts to oil and gas activities may be "possible," the DEA does not quantify these impacts due to considerable uncertainty surrounding the likelihood, timing, and extent of oil and gas development within Unit 1 over the foreseeable future. Instead, the DEA qualitatively discusses the impacts that may occur, such as increased operational costs due to the need to use directional drilling to access oil and gas resources within proposed critical habitat areas.

Comment 24: One comment indicates that the DEA underestimates adverse economic impacts in proposed Unit 1 by failing to quantify potential impacts to forestry activities. The commenter notes that in light of recent litigation and Federal agency initiatives, the likelihood of a Federal nexus for forestry activities is not zero and therefore costs associated with future consultation on these activities should be included in the analysis.

Our Response: The DEA includes a section on potential impacts to forestry activities. Paragraph 95 of

the DEA explains that, "in general, normal silvicultural activities are exempt from section 404 permitting requirements." Although this statement is currently true, recent litigation and Federal agency initiatives could create a circumstance in which silviculture operations are no longer exempt from section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) permitting requirements. A section has been added to the FEA in Chapter 4 to describe the recent and potential future changes. Nevertheless, considerable uncertainty surrounds these rulings and whether they will in fact change the permitting requirements for silvicultural operations in Mississippi and Louisiana within the next 20 years. It follows that the likelihood for these activities to be subject to section 7 consultation considering the gopher frog and its habitat is likewise uncertain. Therefore, the FEA discusses this potential impact qualitatively.

Comment 25: One comment asserts that the Service fails to seriously consider the burden that section 7 consultation will place on the landowners of proposed Unit 1. The commenter expresses concern that the consultation process itself, as well as the outcome of consultation on development within proposed Unit 1, will have negative economic impacts.

Our Response: The DEA estimates a range of possible incremental economic impacts to development in Unit 1. Two of the possible scenarios include the administrative cost of section 7 consultation, as well as a range of impacts associated with the lost value of that land for development assuming that consultation leads to the Service recommending that development be avoided within all or part of the unit. The administrative costs of consultation applied in this analysis are summarized in Exhibit 2–2 and are based on a review of consultation records from sever-

al Service field offices across the country conducted in 2002, and the Federal Government Schedule rates. Costs associated with lost development value of the land within proposed Unit 1 are described in the DEA's section 4–1. The DEA also includes a scenario which assumes that development occurring within Unit 1 avoids impacts on jurisdictional wetlands, and therefore the landowners will not be required to consult with the Service regarding gopher frog critical habitat. This low-**[35127]** end impact estimate is included due to uncertainty regarding the likelihood of a Federal nexus for development activities in Unit 1 and the conservation measures that the Service may recommended if consultation does occur.

Comment 26: Multiple commenters assert that designation would lead to lost tax revenues for the local government and State.

Our Response: The designation of critical habitat is not expected to have an effect on broader regional real estate demand and supply in St. Tammany Parish due to the existence of substitute sites for development activities. As a result, impacts to the regional construction industry and loss in revenue associated with home and business sales are not anticipated to occur. In addition, a reduction in housing supply is unlikely due to the existence of substitute sites, and, in turn, a measurable loss of tax revenue is not expected. A discussion of the potential effect on the regional real estate market has been added to the FEA.

Comment 27: One commenter states that the DEA fails to consider the incremental impacts to future activities in Unit 1 that would be borne by fu-

ture landowners residing within the unit after it has been developed for residential and commercial uses.

Our Response: As described in section 4.1 of the DEA, under scenario 1, no Federal nexus compelling section 7 consultation would occur and therefore no additional economic burdens would be expected for those families and businesses that purchase developed lands. Under scenario 3, no development would occur and thus impacts would be expected to be limited to the existing landowners. Therefore, scenario 2 is the only scenario in which both development and a Federal nexus would be expected to occur. Under this scenario, there is the potential that additional economic impacts could be incurred by landowners who purchase this developed property; however, this would occur only if the landowners undertake activities that result in a Federal nexus. The extent of these impacts would depend on the type and timing of future projects. In general, consultation with the Service at sites that have already been developed are rare. Given the inherent uncertainty, impacts to future landowners cannot be quantified in scenario 2.

Comment 28: One commenter asserts that the Service unjustly ignores the negative economic impacts in Unit 1 on the landowners and St. Tammany Parish by deeming the impacts "insignificant."

Our Response: In the revised proposed rule published in the **Federal Register** on September 27, 2011 (76 FR 59774), the Service states that, "if promulgated, the proposed designation would not directly have a significant effect on a substantial number of small business entities." This certification is based on the screening level analysis of the potential for gopher frog critical habitat designation to affect small entities contained in Appendix A of the DEA.

The results of this screening analysis were revised in the FEA due to the reduction in acreage proposed in the **Federal Register** on January 17, 2012 (77 FR 2254). The screening analysis in the FEA finds that five small entities will be affected by the designation of critical habitat for the gopher frog, accounting for 3.9 percent of the total small Land Subdividers within the counties containing critical habitat. In addition, this screening analysis finds that the annualized impact of the proposed designation of critical habitat within Unit 1 represents from zero to 44.7 percent of the average annual revenue for the four small entities affected in Unit 1. Based on these findings in the screening analysis and the tests set forth under the Small Business Regulatory Enforcement Fairness Act (SBREFA), we certified that, "if promulgated, the proposed designation would not directly have a significant effect on a substantial number of small business entities."

Comment 29: One commenter states that the benefits of designating proposed Unit 1 as critical habitat are vague and highly speculative and not quantified in the DEA on page 5–2.

Our Response: As stated in paragraph 53 of the DEA, the "primary purpose of the rulemaking (i.e., the direct benefit) is the potential to enhance conservation of the species." OMB acknowledges in its guidance for implementing Executive Order 12866 that it may not be feasible to monetize or quantify the benefits of environmental regulations due to either an absence of studies or a lack of resources on the implementing agency's part to conduct new research. Instead of relying on economic measures, the Service believes that the benefits of the proposed rule are best expressed in biological terms that can

then be weighed against the expected costs of the rulemaking.

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[35,128] * * *

Comment 33: Multiple comments state that all privately owned lands, with the exception of those owned by supporters of the designation, should be excluded from the designation of critical habitat. These commenters assert that the proposed designation will negatively affect property values, the livelihood of landowners, and thus the local economy.

Our Response: All known reasonably foreseeable economic impacts on privately owned lands are quantified in the DEA. In particular, section 4.1 of the DEA quantifies potential impacts to land value within Unit 1. In addition to these direct impacts to land value, paragraph 51 of the DEA describes the potential indirect stigma effect that the designation of critical habitat may have on property values. Measurable stigma effects are unlikely, and thus they are quantified in the DEA.

Summary of Changes From Revised Proposed Rule

In preparing this final rule, we reviewed and fully considered comments from the public and peer reviewers that we received in response to our revised proposed rule designating critical habitat for the dusky gopher frog published in the **Federal Register** on September 27, 2011 (76 FR 59774). Based on information we received from peer reviewers, we amended the methodology we used in constructing critical habitat units. This change is described in detail in our January 17, 2012 publication announcing a public hearing in the **Federal Register** (77 FR

2254). Proposed changes included: combining all movement data from different studies conducted at the same site; discarding one field observation from the movement data because it did not provide specific information on breeding pond or upland habitat use; and standardizing all movement data to reflect straight-line distances between breeding ponds and uplands. As a result of these changes, proposed critical habitat for the dusky gopher frog was reduced by 193 ha (477 ac).

During a review of aerial photography prior to making the final maps of critical habitat for this final rule, we identified an agricultural field within critical habitat Unit 10 as it was described in the revised proposed rule. Because this agricultural area does not contain habitat suitable for the dusky gopher frog, it has been removed from the critical habitat designation. This change resulted in a further reduction of critical habitat of 35 ha (87 ac).

As a result of these two changes, there is a total reduction of 228 ha (564 ac) from the critical habitat we proposed on September 27, 2011, (76 FR 59774). In this rule we are designating approximately 2,621 ha (6,477 ac) of critical habitat for the dusky gopher frog.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species; and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2)

of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographic area occupied by the species at the time it was listed are included in a critical habitat designation if they contain the physical and biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographic area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of

the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographic area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species. **[35,129]**

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we determine which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographic area occupied by the species at the time of

listing to designate as critical habitat, we consider the physical or biological features essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographic, and ecological distributions of a species.

We derive the specific physical or biological features required for the dusky gopher frog from studies of this species' habitat, ecology, and life history as described in the Critical Habitat section of the revised proposed rule to designate critical habitat published in the **Federal Register** on September 27, 2011 (76 FR 59774), and in the information presented below. Additional information can be found in the final listing rule published in the **Federal Register** on December 4, 2001 (66 FR 62993). We have determined that the dusky gopher frog requires the following physical or biological features.

Space for Individual and Population Growth and for Normal Behavior

Dusky gopher frogs are terrestrial amphibians endemic to the longleaf pine ecosystem. They spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine

woodlands historically dominated by longleaf pine (naturally occurring slash pine (*Pinus elliottii*) in wetter areas). Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds (Hedman *et al.* 2000, p. 233; Kirkman *et al.* 2000, p. 373). Historically, fire-tolerant longleaf pine dominated the uplands; however, much of the original habitat has been converted to pine (often loblolly (*P. taeda*) or slash pine) plantations and has become a closed-canopy forest unsuitable as habitat for dusky gopher frogs and other species of gopher frogs (Roznik and Johnson 2009a, p. 265).

During the breeding season, dusky gopher frogs leave their subterranean retreats in the uplands and migrate to their breeding sites during rains associated with passing cold fronts. Breeding sites are ephemeral (seasonally flooded), isolated ponds (not connected to other water bodies) located in the uplands. Both forested uplands and isolated wetlands (see "*Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring*" for further discussion of isolated wetlands) are needed to provide space for individual and population growth and for normal behavior.

After breeding, adult dusky gopher frogs leave pond sites during major rainfall events; metamorphic frogs follow, after their development is complete. Limited data are available on the distance between the wetland breeding and upland terrestrial habitats of post-larval and adult dusky gopher frogs. Richter *et al.* (2001, pp. 316-321) used radio transmitters to track a total of 13 adult frogs at Glen's Pond, the primary dusky gopher frog breeding site, located in Harrison County, Mississippi. The farthest move-

ment recorded was 299 meters (m) (981 feet (ft)) by a frog tracked for 63 days from the time of its exit from the breeding site (Richter *et al.* 2001, p. 318). Tupy and Pechmann (2011, p. 1) conducted a more recent radio telemetry study of 17 dusky gopher frogs captured at Glen's Pond. The maximum distance traveled by these frogs to underground refuges was 240 m (787 ft).

Studies of a closely related gopher frog (*Rana capito*) in Florida, Georgia, and North Carolina, have documented surprisingly long movements between their breeding ponds and upland refugia. In a study in the sandhills of North Carolina, the post-breeding movements of 17 gopher frogs were tracked (Humphries and Sisson 2011, p. 1). The maximum distance a frog was found from its breeding site was 3.5 kilometers (km) (2.2 miles (mi)). In Florida, gopher frogs have been found up to 2 km (1.2 mi) from their breeding **[35,130]** sites (Franz *et al.* 1988, p. 82). The frequency of these long-distance movements is not known (see discussion in Roznik *et al.* 2009, p. 192). A number of other gopher frog studies have either generated data on radio-tracked frogs, or provided observations of them, in upland habitat at varying distances from their breeding ponds. We assessed these studies, and when multiple studies were conducted on a single population, we combined data for each site (we also combined the two data sets for dusky gopher frog). In the additional gopher frog studies, the maximum straight-line distances from pond to upland refugia are: 300 m (984 ft) (Georgia; Rostal 1999, p. 1); 525 m (1,722 ft) (Georgia; Neufeldt and Birkhead 2001, p. 10); 571 m (1,873 ft) (Florida; Blihovde 2006, p. 267); and 862 m (2,828 ft) (Florida; Roznik 2007, p. 10).

It is difficult to interpret specific habitat use for the dusky gopher frog from the limited available data. Movements are generally between breeding sites and belowground refugia, and distances moved are likely to be tied to the abundance and distribution of appropriate refugia. We have assumed that the dusky gopher frog can move farther distances, and may use a larger area, than the existing data for the species indicate. For this reason, we used data from the dusky gopher frog and other species of gopher frogs to estimate the potential distance a dusky gopher frog may move between its breeding pond and upland refugia. These seven values included the longest movement recorded for the dusky gopher frog, 299 m (981 ft), and the six values for other species of gopher frogs as described in the paragraph above. We then took the median value of all the dusky gopher frog and gopher frog movement data available to us (571 m (1,873 ft)), and used this value to construct the area of critical habitat around each occupied or unoccupied dusky gopher frog breeding pond. See also Summary of Changes from Revised Proposed Rule, above.

Due to the low number of occupied sites for the species, and with the cooperation of our Federal, State, and nongovernmental agency partners, management has been conducted at specific sites to improve habitat for dusky gopher frogs with the hope of establishing new populations at the sites (see "*Criteria Used To Identify Critical Habitat*"), When possible, we are managing wetlands in these areas within 1,000 m (3,281 ft) of each other as a block in order to create multiple breeding sites and metapopulation structure (defined as neighboring local populations close enough to one another that dispersing individuals could be exchanged (gene flow) at least once per

generation) in support of recovery (Marsh and Trenham 2001, p. 40; Richter *et al.* 2003, p. 177).

Due to fragmentation and destruction of habitat, the current range of naturally occurring dusky gopher frogs has been reduced to three sites (Glen's Pond, Mike's Pond, and McCoy's Pond). In addition, optimal terrestrial habitat for gopher frogs is considered to be within burrows of the gopher tortoise (*Gopherus polyphemus*), a rare and declining species that is listed as threatened under the Act within the range of the dusky gopher frog. Therefore, this specialized microhabitat has been reduced as well. Fragmentation and loss of the dusky gopher frog's habitat has subjected the species' small, isolated populations to genetic isolation and reduction of space for reproduction, development of young, and population maintenance; thus, the likelihood of population extinction has increased (U.S. Fish and Wildlife Service 2001, pp. 62993–63002). Genetic variation and diversity within a species are essential for recovery, adaptation to environmental changes, and long-term viability (capability to live, reproduce, and develop) (Harris 1984, pp. 93–107). Long-term viability is founded on the existence of numerous interbreeding, local populations throughout the range (Harris 1984, pp. 93–107).

Connectivity of dusky gopher frog breeding and nonbreeding habitat within the geographic area occupied by the species must be maintained to support the species' survival. Additionally, connectivity of these sites with other areas outside the geographic area occupied currently by the dusky gopher frog is essential for the conservation of the species. Research on other species of pond-breeding amphibians demonstrates the importance of connectivity of breeding and nonbreeding habitat, as well as occu-

pied and unoccupied sites (Semlitsch 2002, p. 624; Harper *et al.* 2008, p. 1205). Connectivity allows for gene flow among local populations within a metapopulation, which enhances the likelihood of metapopulation persistence and allows for recolonization of sites that are lost due to drought, disease, or other factors (Hanski and Gilpin 1991, pp. 4–6).

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Dusky gopher frog tadpoles eat periphyton (microscopic algae, bacteria, and protozoans) from surfaces of emergent vegetation or along the pond bottom, as is typical of pond-type tadpoles (Duellman and Trueb 1986, p. 159). Juvenile and adult gopher frogs are carnivorous. Insects found in their stomachs have included carabid (*Pasimachus* sp.) and scarabaeid (genera *Canthon* sp. and *Ligyrus* sp.) beetles (Netting and Goin 1942, p. 259) and *Ceuthophilus* crickets (Milstrey 1984, p. 10). Dusky gopher frogs are gape-limited (limited by the size of the jaw opening) predators with a diet probably similar to that reported for other gopher frogs, including other frogs, toads, beetles, hemipterans, grasshoppers, spiders, roaches, and earthworms (Dickerson 1969, p. 196; Carr 1940, p. 64). Within the pine uplands, a diverse and abundant herbaceous layer consisting of native species, maintained by frequent fires, is important to maintain the prey base for juvenile and adult dusky gopher frogs. Wetland water quality and an open canopy (Skelly *et al.* 2002, p. 983) are important to the maintenance of the periphyton that serves as a food source for dusky gopher frog tadpoles.

Cover or Shelter

Amphibians need to maintain moist skin for respiration (breathing) and osmoregulation (controlling the amounts of water and salts in their bodies) (Duellman and Trueb 1986, pp. 197–222). Because dusky gopher frogs disperse from their aquatic breeding sites to the uplands where they live as adults, desiccation (drying out) can be a limiting factor in their movements. Thus, it is important that areas connecting their wetland and terrestrial habitats are protected in order to provide cover and appropriate moisture regimes during their migration. Richter *et al.* (2001, pp. 317–318) found that during migration, dusky gopher frogs used clumps of grass or leaf litter for refuge. Protection of this connecting habitat may be particularly important for juveniles as they move out of the breeding pond for the first time. Studies of migratory success in post-metamorphic amphibians have demonstrated the importance of high levels of survival of these individuals to population maintenance and persistence (Rothermel 2004, pp. 1544–1545)

Both adult and Juvenile dusky gopher frogs spend most of their lives underground in forested uplands (Richter *et al.* 2001, p. 318). Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees (Richter *et al.* 2001, p. 318). Availability of appropriate underground sites is especially **[35,131]** important for juveniles in their first year. Survival of juvenile gopher frogs in north-central Florida was found to be dependent on their use of underground refugia (Roznik and Johnson 2009b, p. 431). Gopher frogs that did not occupy an underground refuge experienced much higher levels of mortality when compared with those that did occupy underground refuges (Roznik and Johnson 2009b, p. 434).

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Dusky gopher frog breeding sites are isolated ponds that dry completely on a cyclic basis. Faulkner (U.S. Fish and Wildlife Service 2001, p. 62994) conducted hydrologic research at the Glen's Pond site in DNF, Harrison County, Mississippi. He described the pond as a depressional feature on a topographic high. The dominant source of water to the pond is rainfall within a small, localized watershed that extends 61 to 122 m (200 to 400 ft) from the pond's center. Substantial winter rains are needed to ensure that the pond fills sufficiently to allow hatching, development, and metamorphosis (change to adults) of larvae. The timing and frequency of rainfall are critical to the successful reproduction and recruitment of dusky gopher frogs. Adult frogs move to wetland breeding sites during heavy rain events, usually from January to late March (Richter and Seigel 2002, p. 964).

Studies at Glen's Pond indicate that this breeding pond is approximately 1.5 ha (3.8 ac) when filled and attains a maximum depth of 1.1 m (3.6 ft) (Thurgate and Pechmann 2007, p. 1846). The pond is hard-bottomed, contains emergent and submergent vegetation, and has an open canopy cover. It is especially important that a breeding pond have an open canopy; although the mechanism is unclear, it is believed an open canopy is critical to tadpole development. Experiments conducted by Thurgate and Pechmann (2007, pp. 1845–1852) demonstrated the lethal and sublethal effects of canopy closure on dusky gopher frog tadpoles. Canopy closure reduced the number of tadpoles that survived to metamorphosis and reduced the growth rates of those that did survive so that they were smaller at metamorphosis (Thurgate and Pechmann 2007, pp. 1845). The gen-

eral habitat attributes of the other three dusky gopher frog breeding ponds are similar to those of Glen's Pond. Female dusky gopher frogs attach their eggs to rigid vertical stems of emergent vegetation (Young 1997, p. 48). Breeding ponds typically dry in early to mid-summer, but on occasion have remained wet until early fall (Richter and Seigel 1998, p. 24). Breeding ponds of closely related gopher frogs in Alabama (east of the Mobile River drainage) and Florida have similar structure and function to those of the dusky gopher frog (Bailey 1990, p. 29; Palis 1998, p. 217; Greenberg 2001, p. 74).

An unpolluted wetland with water free of predaceous fish, suspended sediment, pesticides, and chemicals associated with road runoff is important for egg development, tadpole growth and development, and successful mating and egg-laying by adult frogs. For further information, see our December 4, 2001, listing rule (66 FR 62993).

Primary Constituent Elements for the Dusky Gopher Frog

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features (discussed above) and habitat characteristics required to sustain the species' life-

history processes, we determine that the primary constituent elements specific to the dusky gopher frog are;

(1) Primary Constituent Element 1—*Ephemeral wetland habitat.* Breeding ponds, geographically isolated from other waterbodies and embedded in forests historically dominated by longleaf pine communities, that are small (generally <0.4 to 4.0 ha (<1 to 10 ac)), ephemeral, and acidic. Specific conditions necessary in breeding ponds to allow for successful reproduction of dusky gopher frogs are:

(a) An open canopy with emergent herbaceous vegetation for egg attachment;

(b) An absence of large, predatory fish that prey on frog larvae;

(c) Water quality such that frogs, their eggs, or larvae are not exposed to pesticides or chemicals and sediment associated with road runoff; and

(d) Surface water that lasts for a minimum of 195 days during the breeding season to allow a sufficient period for larvae to hatch, mature, and metamorphose.

(2) Primary Constituent Element 2—*Uplond forested nonbreeding habitat.* Forests historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover and gopher tortoise burrows, small mammal burrows, stump holes, or other underground habitat that the dusky gopher frog depends upon for food, shelter, and protection from the elements and predation,

(3) Primary Constituent Element 3—*Upland connectivity habitat.* Accessible upland habitat be-

tween breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites. This habitat is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements, such as that created by deep litter cover, clumps of grass, or burrows.

With this designation of critical habitat, we intend to identify the physical or biological features essential to the conservation of the species through the identification of the elements of the features, the primary constituent elements, that support the life-history processes of the species. The Service has determined that Unit 2a contained all of the PCEs, Units 2b through 12 are essential to the conservation of the species and also contain all of the PCEs, and Unit 1 is essential to the conservation of the species and contains one of the PCEs.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographic area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection.

All areas occupied at the time of listing will require some level of management to address the current and future threats to the dusky gopher frog and to maintain or restore the PCEs. Unoccupied areas will also require management to complete restoration. The features essential to the conservation of this species may require special management considerations or protection to reduce various threats to critical habitat that may affect one or more of the

PCEs. Special management of ephemeral wetland habitats ((breeding sites (PCE 1)) will be needed to ensure that these areas provide water **[35,132]** quantity, quality, and appropriate hydroperiod; cover; and absence from levels of predation and disease that can affect population persistence. In nonbreeding upland forested habitat (PCEs 2 and 3), special management will be needed to ensure an open canopy and abundant herbaceous ground cover; underground habitat for adult and subadult frogs to occupy; and sufficient cover as frogs migrate to and from breeding sites. A detailed discussion of activities influencing the dusky gopher frog and its habitat can be found in the final listing rule (66 FR 62993; December 4, 2001). Activities that may warrant special management of the physical or biological features that define essential habitat (appropriate quantity and distribution of PCEs) for the dusky gopher frog include, but are not limited to: (1) Land use conversions, primarily urban development and conversion to agriculture and pine plantations; (2) stump removal and other soil-disturbing activities that destroy the belowground structure within forest soils; (3) fire suppression and low fire frequencies; (4) wetland destruction and degradation; (5) random effects of drought or floods; (6) off-road vehicle use; (7) maintenance of gas, water, electrical power, and sewer easements; and (8) activities that disturb underground refugia used by dusky gopher frogs for foraging, protection from predators, and shelter from the elements.

Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2)

conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover; (3) maintaining forest underground structure such as gopher tortoise burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to designate critical habitat. We reviewed available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are designating critical habitat in areas within the geographic area occupied by the species at the time of listing in 2001, We also are designating specific areas outside the geographic area occupied by the species at the time of listing, including those that are currently occupied, and others which are currently unoccupied, Most of the unoccupied areas designated as critical habitat are part of ongoing recovery initiatives for this species. We have determined that all areas designated as critical habitat outside the area occupied by the species at the time of listing are essential for the conservation of the species.

Dusky gopher frogs require small, isolated, ephemeral, acidic, depressional standing bodies of

freshwater for breeding; upland pine forested habitat that has an open canopy maintained by fire (preferably) for nonbreeding habitat; and upland connectivity habitat areas that allow for movement between nonbreeding and breeding sites. Dusky gopher frog populations are likely to function as metapopulations when occupied habitat is improved and that option is available to them since other species of gopher frogs behave in this way. In certain years and under certain conditions, dusky gopher frogs may move from ponds that become unsuitable to others that are suitable. Or in some years, if ponds fail to fill with water, local extirpations may occur and dusky gopher frogs from adjacent ponds may recolonize those sites when they fill with water again. The range of the dusky gopher frog has been severely curtailed, occupied habitats are limited and isolated, and population sizes are extremely small and at risk of extirpation and extinction from stochastic events that occur as periodic natural events or existing or potential human-induced events (U.S. Fish and Wildlife Service 2001, pp. 62993–63002). To reduce the risk of extinction through these processes, it is important to establish multiple protected subpopulations across the landscape (Soulé and Simberloff 1986, pp. 25–35; Wiens 1996, pp. 73–74). We considered the following criteria in the selection of areas that contain the essential features for the dusky gopher frog when designating units: (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland sites; and (5)

multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

We began our determination of which areas to designate as critical habitat for the dusky gopher frog with an assessment of the critical life-history components of the dusky gopher frog, as they relate to habitat. We then evaluated the dusky gopher frog in the context of its historic (Alabama (west of the Mobile River drainage), Louisiana, and Mississippi) and current (Mississippi) distribution to establish what portion of its range still contains the physical and biological features that are essential to the conservation of the species. We reviewed the available information pertaining to historic and current distributions, life histories, and habitat requirements of this species. We focused on the identification of ephemeral wetland habitats in our analysis because they are requisite sites for population survival and conservation and their rarity in the environment is one of the primary reasons that the frog is endangered. Our sources included surveys, unpublished reports, and peer-reviewed scientific literature prepared by the Alabama Department of Conservation and Natural Resources, Alabama Natural Heritage Program, Louisiana Department of Wildlife and Fisheries, Natural Heritage Program, Mississippi Department of Wildlife, Fisheries, and Parks, and dusky gopher frog researchers and other herpetologists that specialize in frogs; Service data and publications such as the final listing rule for the dusky gopher frog; and Geographic Information System (GIS) data (such as species occurrence data, habitat data, land use, topography, digital aerial photography, and ownership maps).

In Alabama, we were unable to identify habitat that met the requirements for sustaining the essen-

tial life-history functions of the species. No historical breeding sites for the species are known in Alabama. The only dusky gopher frog (as currently described) record from Alabama was an observation by Löding in 1922, and summarized in Wright and Wright (1949, p. 539). Löding found three gopher frogs under drift logs on the beach of Mobile Bay just south of the mouth of Dog River, Mobile County, **[35,133]** Alabama. Bailey (1994, pp. 4–5) visited this area in 1993, and found it to be a residential development, although large longleaf pine trees in lawns and vacant lots indicated the area could have formerly been suitable upland habitat for gopher frogs. Neither Löding nor Bailey located a possible breeding site in the vicinity of the record. Researchers have conducted two studies in southwestern Alabama to look for habitat that could support dusky gopher frogs. Hart (2004, pp. 1–9) initiated a remote sensing study using aerial photography of Mobile and Washington Counties, Alabama, to find open, isolated ponds in proximity to forested terrain. This technique was used to identify sites with the potential for supporting dusky gopher frog populations. Hart (2004, pp. 1–9) conducted field assessments of 41 ponds in Mobile County, Alabama, but habitat quality at these ponds was limited. Ponds were overgrown with woody vegetation and lacked the emergent vegetation necessary for dusky gopher frog egg attachment (Hart 2004, p. 9). Additional ponds were identified remotely in Washington County, Alabama, but were not visited, and their habitat quality is unknown. Bailey (2009, pp. 1–14) used a similar remote sensing technique to locate a total of 21 ponds in Choctaw, Mobile, and Washington Counties, Alabama. However, this was a coarse filter approach, and field assessments were not possible due to drought conditions and inaccessibility resulting from site isolation.

No areas suitable for conservation of the dusky gopher frog were identified in either of the remote sensing studies. No dusky gopher frog populations in Alabama were discovered during field assessments associated with Hart's (2004, pp. 1–9) study. At this time, the Service has not been able to identify suitable areas in Alabama that are essential for the conservation of the dusky gopher frog; thus, none are being designated as critical habitat.

In Louisiana, the dusky gopher frog was last observed in 1965. The Service visited the area of historic dusky gopher frog occurrence in St. Tammany Parish, Louisiana, and conducted a habitat assessment in March 2011. The area is managed for timber by a company conducting industrial forestry. Although the surrounding uplands are poor quality terrestrial habitat for dusky gopher frogs, we visited at least five ephemeral ponds, including the last known record of the species in Louisiana. These ponds were intact and of remarkable quality. This same area was surveyed for gopher frogs in the 1990s and 2000s. During those visits, the ephemeral ponds were considered similar in appearance (water clarity, depth, vegetation) to ponds in Mississippi used for breeding by the dusky gopher frog (Thomas and Ballew 1997, p. 6; Leonard *et al.* 2003, pp. 7–8; Pechmann *et al.* 2006, pp. 8, 10). Our observations in 2011 indicated the Louisiana ponds were little changed from the descriptions provided by the previous surveyors. In addition, the ponds are in close proximity to each other, which would allow movement of adult gopher frogs between them. In fact, no group of five ponds such as these was found in any of the areas of historical occurrence that we have searched in Mississippi. Dusky gopher frogs exhibit high larval and juvenile mortality. Multiple breeding sites protect against

catastrophic loss at any one site and provide opportunity for recolonization. This is an especially important aspect of critical habitat for dusky gopher frogs due to their limited population numbers. The multiple ponds present at the St. Tammany Parish site provide metapopulation structure that supports long-term survival and population resiliency. As a result, the Service determined that this area of St. Tammany Parish (Unit 1) is essential for the conservation of the dusky gopher frog.

In Mississippi, we identified ephemeral wetland habitat throughout the coastal counties within the historic distribution of the dusky gopher frog using U.S. Geological Survey topographic maps, National Wetland Inventory maps, Natural Resource Conservation Service county soil survey maps, and satellite imagery. Because we had previously identified existing sites with habitat essential for the conservation of the dusky gopher frog in our 2010 proposed rule (75 FR 31387), we searched for additional habitat with the best potential of restoring the physical and biological features essential for the conservation of the dusky gopher frog. We found these areas were concentrated on the DNF in Forrest, Harrison, and Perry Counties in southern Mississippi. Some additional sites were found in Jackson County on Federal land being managed by the State as a Wildlife Management Area and on private land being managed as a wetland mitigation bank. Once these areas were identified, we coordinated with our partners in the U.S. Forest Service, the U.S. Army Corps of Engineers, the Mississippi Department of Wildlife, Fisheries, and Parks, and The Nature Conservancy as they worked on habitat restoration efforts at the sites. The habitat quality of isolated ephemeral wetlands and the upland pine forests surrounding them

were improved to benefit the recovery of the dusky gopher frog. The habitat restoration efforts have been successful in establishing or improving the quality of the three PCEs required to sustain the dusky gopher frog's life-history processes on each of these sites. Therefore, the Service has determined that these unoccupied sites are essential for the conservation of the species.

Only one subunit (Unit 2, subunit A) is known to have been occupied at the time of listing. We believe this occupied area contains sufficient PCEs to support life-history functions essential to the conservation of the species; however, this lone area is not sufficient to conserve the species. Therefore, sites not known to be occupied at the time of listing have also been designated as critical habitat. Three units/subunits (Unit 4, subunit A; Unit 5, subunit A; and Unit 7) are currently occupied by the dusky gopher frog, but were discovered or established subsequent to the listing of the species. Eleven units/subunits, not known to be occupied at the time of listing but within the historic range of the species, are also currently unoccupied. The inclusion of these eleven areas will provide habitat for population translocation and support recovery efforts for the dusky gopher frog. One of the unoccupied units (Unit 1) represents an historic record for the dusky gopher frog. The historic occupancy status of the other 10 units/subunits is unknown. All 14 units/subunits not known to be occupied at the time of listing have been designated as critical habitat because the Service has determined they are essential for the conservation of the species. The dusky gopher frog is at high risk of extirpation from stochastic events, such as disease or drought, and from demographic factors such as inbreeding depression. The establishment of additional

populations beyond the single site known to be occupied at listing is critical to protect the species from extinction and provide for the species' eventual recovery.

We have determined that, with proper protection and management, the areas we are designating as critical habitat are essential for the conservation of the species based on our current understanding of the species' requirements. However, as discussed in the Critical Habitat section above, we recognize that designation of critical habitat may not include all habitat areas that we may eventually determine are necessary for the recovery of the species **[35,134]** and that, for this reason, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

We delineated the critical habitat unit boundaries using the following steps:

(1) We used digital aerial photography using ArcMap 9.3.1 to map

(a) The specific location of the breeding site occupied by the dusky gopher frog at the time of listing, and

(b) Those locations of breeding sites outside the geographic area occupied by the species at the time it was listed, that are currently occupied and not occupied, that were determined to be essential for the conservation of the species;

(2) We delineated critical habitat units by buffering the above locations by a radius of 621 m (2,037 ft). We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat and incorporate all primary con-

stituent elements within the critical habitat unit. We chose the value of 621 m (2,037 ft) by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog group (see "*Space for Individual and Population Growth and for Normal Behavior*") and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use (see discussion in Semlitsch and Bodie 2003, pp. 1222-1223);

(3) We used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure (see "*Space for Individual and Population Growth and for Normal Behavior*").

When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas, such as lands covered by buildings, pavement, and other structures, because such lands lack physical or biological features for the dusky gopher frog. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are designating as critical habitat twelve units, three of which are divided into two subunits

each, based on sufficient elements of physical or biological features present to support dusky gopher frog life processes. Some units/subunits contain all of the identified elements of physical or biological features and support multiple life processes. Other units contain only some elements of the physical or biological features necessary to support the dusky gopher frog's particular use of that habitat.

Final Critical Habitat Designation

We are designating 15 units/subunits as critical habitat for the dusky gopher frog. The critical habitat areas described below constitute our current best assessment at this time of areas that meet the definition of critical habitat. Table 1 below shows the specific occupancy status of each unit/subunit at the time of listing and currently, based on the most recent data available.

TABLE 1—OCCUPANCY OF DUSKY GOPHER FROG BY DESIGNATED CRITICAL HABITAT UNITS

Unit	Parish/county	Occupied at the time of listing, currently occupied	Not occupied at the time of listing, currently occupied	Not occupied at the time of listing, currently unoccupied
LOUISIANA				
1	S. Tammany			X
MISSISSIPPI				
2, Subunit A	Harrison	X		
2, Subunit B	Harrison			X
3	Harrison			X
4, Subunit A	Jackson		X	
4, Subunit B	Jackson			X
5, Subunit A	Jackson		X	
5, Subunit B	Jackson			X
6	Jackson			X
7	Jackson		X	
8	Forrest			X
9	Forrest			X
10	Perry			X
11	Perry			X
12	Perry			X

Table 2 provides the approximate area unit and ownership of each critical habitat unit. Hectare and acre values were individually computer-generated

using GIS software, rounded to nearest whole number, and then summed. **[35,135]**

TABLE 2—DESIGNATED CRITICAL HABITAT UNITS FOR DUSKY GOPHER FROG BY LAND OWNERSHIP

[Area estimates (hectares (ha) and acres (ac)) reflect all land within critical habitat unit boundaries]

Unit	Parish/county	Ownership			Total area
		Federal	State	Private	
LOUISIANA					
1	St. Tammany			625 ha (1,544 ac)	625 ha (1,544 ac)
MISSISSIPPI					
2, Subunit A	Harrison	100 ha (247 ac)		21 ha (52 ac)	121 ha (299 ac)
2, Subunit B	Harrison	425 ha (1,050 ac)		3 ha (7 ac)	428 ha (1,057 ac)
3	Harrison	121 ha (299 ac)			121 ha (299 ac)
4, Subunit A	Jackson			121 ha (299 ac)	121 ha (299 ac)
4, Subunit B	Jackson	48 ha (119 ac)		109 ha (269 ac)	157 ha (388 ac)
5, Subunit A	Jackson			121 ha (299 ac)	121 ha (299 ac)
5, Subunit B	Jackson			54 ha (133 ac)	54 ha (133 ac)
6	Jackson	121 ha (299 ac)			121 ha (299 ac)
7	Jackson		107 ha (264 ac)	14 ha (35 ac)	121 ha (299 ac)
8	Forrest	121 ha (299 ac)			121 ha (299 ac)
9	Forrest	120 ha (297 ac)		1 ha (2.5 ac)	121 ha (299 ac)
10	Perry	127 ha (314 ac)		20 ha (49 ac)	147 ha (363 ac)
11	Perry	119 ha (294 ac)		2 ha (5 ac)	121 ha (299 ac)
12	Perry	115 ha (284 ac)		6 ha (15 ac)	121 ha (299 ac)
Total	All Parishes and Counties	1,417 ha (3,501 ac)	107 ha (264 ac)	1,097 ha (2,711 ac)	2,621 ha (6,477 ac)

Note: Area sizes may not sum due to rounding.

We present below brief descriptions of all units and reasons why they meet the definition of critical habitat for the dusky gopher frog.

Unit 1: St. Tammany Parish, Louisiana

Unit 1 encompasses 625 ha (1,544 ac) on private lands managed for industrial forestry in St. Tamma-

ny Parish, Louisiana. This unit is located north and south of State Hwy. 36, approximately 3.1 km (1.9 mi) west of State Hwy. 41 and the town of Hickory, Louisiana. Unit 1 is not within the geographic area occupied by the species at the time of listing. It is currently unoccupied; however, the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within this unit.

Unit 1 consists of five ponds (ephemeral wetland habitat) and their associated uplands. If dusky gopher frogs are translocated to the site, the five ponds are in close enough proximity to each other that adult frogs could move between them and create a metapopulation, which increases the chances of the long-term survival of the population. Although the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species is at high risk of extirpation from stochastic events, such as disease or drought. Maintaining the five ponds within this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. Therefore, we have determined this unit is essential for the conservation of the species because it provides important breeding sites for recovery. It includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog.

Unit 2: Harrison County, Mississippi

Unit 2 comprises two subunits encompassing 549 ha (1,356 ac) on Federal and private lands in Harrison County, Mississippi. This unit, between U.S. Hwy. 49 and Old Hwy. 67, is approximately 224 m (735 ft) northeast of the Biloxi River. It is located approximately 2.8 km (1.8 mi) east of U.S. Hwy. 49 and approximately 2.3 km (1.4 mi) west of Old Hwy. 67. Within this unit, approximately 525 ha (1,297 ac) are in the DNF and 24 ha (59 ac) are in private ownership. **[35,136]**

Subunit A

Unit 2, Subunit A encompasses 121 ha (299 ac) around the only breeding pond (Glen's Pond) known for the dusky gopher frog when it was listed in 2001; as a result, it is within the geographic area of the species occupied at the time of listing. In addition, this subunit contains all elements of the essential physical or biological features of the species. The majority of this subunit (100 ha (247 ac)) is in the DNF, with the remainder (21 ha (52 ac)) in private ownership. This subunit is being designated as critical habitat because it was occupied at the time of listing, is currently occupied, and contains sufficient primary constituent elements (ephemeral wetland habitat (PCE 1), upland forested nonbreeding habitat (PCE 2), and upland connectivity habitat (PCE 3)) to support life-history functions essential to the conservation of the species.

Glen's Pond and the habitat surrounding it, consisting of forested uplands used as nonbreeding habitat and upland connectivity habitat between breeding and nonbreeding habitat, support the majority of the dusky gopher frogs that currently exist in the wild. Within Unit 2, Subunit A, the dusky gopher frog and its habitat may require special management

considerations or protection to address potential adverse effects caused by: Fire suppression and low fire frequencies; detrimental alterations in forestry practices that could destroy belowground soil structures, such as stump removal; hydrologic changes resulting from ditches, and/or adjacent highways and roads that could alter the ecology of the breeding pond and surrounding terrestrial habitat; wetland degradation; random effects of drought or floods; off-road vehicle use; gas, water, electrical power, and sewer easements; and agricultural and urban development.

Subunit B

Unit 2, Subunit B encompasses 428 ha (1,057 ac) adjacent to Subunit A and the area surrounding Glen's Pond. The majority of this subunit (425 ha (1,050 ac)) is in the DNF, with the remainder (3 ha (7 ac)) in private ownership. This subunit is not within the geographic area of the species occupied at the time of listing and is currently unoccupied. However, we believe this subunit is essential for the conservation of the dusky gopher frog because it consists of areas, within the dispersal range of the dusky gopher frog (from Subunit A), which we believe provide important breeding sites for recovery and metapopulation structure that will protect the dusky gopher frog from extinction. This unoccupied area consists of three ponds and their associated uplands in the DNF. These ponds were named Reserve Pond, Pony Ranch Pond, and New Pond during our ongoing recovery initiatives. The USFS is actively managing this area to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and the severely restricted range of the dusky gopher frog, the species is at high risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which

dusky gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery.

Unit 3: Harrison County, Mississippi

Unit 3 encompasses 121 ha (299 ac) on Federal land in Harrison County, Mississippi. This unit is located in the DNF approximately 7.9 km (4.9 mi) east of the community of Success at Old Hwy. 67 and 4 km (2.5 mi) south of Bethel Road.

Unit 3 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area surrounds a pond on the DNF that was given the name of Carr Bridge Road Pond during ongoing recovery initiatives when it was selected as a dusky gopher frog translocation site. The USFS is actively managing this area to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the potential risk of **[35,137]** extinction of the species resulting from stochastic events and to provide for the species' eventual recovery. Therefore, this unit is being designated as critical habitat because it is essential for the conservation of the species.

Unit 4: Jackson County, Mississippi

Unit 4 encompasses 278 ha (687 ac) on Federal and private land in Jackson County, Mississippi. This unit borders the north side of Interstate 10 approximately 1.1 km (0.7 mi) west of State Hwy. 57.

Within this unit, approximately 48 ha (119 ac) are in the Mississippi Sandhill Crane National Wildlife Refuge and 230 ha (568 ac) are in private ownership.

Subunit A

Unit 4, Subunit A encompasses 121 ha (299 ac) on private land. It is currently occupied as a result of translocation efforts conducted in 2004, 2005, 2007, 2008, 2009, and 2010; however, it was not occupied at the time of listing. We believe this subunit is essential for the conservation of the dusky gopher frog because of the presence of a proven breeding pond (egg masses have been deposited here in 2007 and 2010 by gopher frogs translocated to the site) and its associated uplands (upland forested nonbreeding habitat and upland connectivity habitat). We also believe that metapopulation structure, which will further protect the dusky gopher frog from extinction, is possible when the whole area of Unit 4 is considered. The private owners of this property are actively managing this area to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at high risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which dusky gopher frogs can continue to be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery.

Subunit B

Unit 4, Subunit B encompasses 157 ha (388 ac) on Federal and private land adjacent to Subunit A. The majority of this subunit (109 ha (269 ac)) is on private land, with the remainder of the unit (48 ha (119 ac)) in the Mississippi Sandhill Crane National

Wildlife Refuge. This subunit is not within the geographic area of the species occupied at the time of listing and is currently unoccupied. However, we believe this subunit is essential for the conservation of the dusky gopher frog because it consists of an area, within the dispersal range of the dusky gopher frog (from Subunit A), which provides two important breeding sites and their associated upland for recovery and metapopulation structure that will protect the dusky gopher frog from extinction. This area is actively managed to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 5: Jackson County, Mississippi

Unit 5 encompasses 175 ha (432 ac) on private land in Jackson County, Mississippi. This unit is located approximately 10.6 km (6.6 mi) north of Interstate 10. It is 124 m (407 ft) north of Jim Ramsey Road and 5.7 km (3.6 mi) west of the community of Vancleave located near State Hwy. 57.

Subunit A

Unit 5, Subunit A encompasses 121 ha (299 ac) on private land. It is currently occupied, but was not known to be occupied at the time of listing. This subunit contains a breeding site where dusky gopher frogs were discovered in 2004, subsequent to the listing of the dusky gopher frog.

We believe this subunit is essential for the conservation of the dusky gopher frog because of the presence of a proven breeding pond, named Mike's Pond (ephemeral wetland habitat), and its associated uplands (upland forested nonbreeding habitat and upland connectivity habitat). We also believe that metapopulation structure, which will further protect the dusky gopher frog from extinction, is possible when the whole area of Unit 5 is considered. The owners of this property are actively managing this area to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at high risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery.

Subunit B

Unit 5, Subunit B encompasses 54 ha (133 ac) on private land adjacent to Subunit A. This subunit is not within the geographic area of the species occupied at the time of listing and is currently unoccupied. However, we believe this subunit is essential for the conservation of the dusky gopher frog because it consists of an area, within the dispersal range of the dusky gopher frog (from Subunit A), which provides an important breeding site and associated forested uplands for recovery and metapopulation structure that will protect the dusky gopher frog from extinction. This unoccupied area consists of a single pond and its associated uplands. This area is actively managed to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the

dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 6: Jackson County, Mississippi

Unit 6 encompasses 121 ha (299 ac) on Federal land in Jackson County, Mississippi. This unit is located on the Ward Bayou Wildlife Management Area (WMA) approximately 4.8 km (3 mi) northeast of State Hwy. 57 and the community of Vancleave. This land is owned by the U.S. Army Corps of Engineers (Corps) and managed by the Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) to benefit the recovery of the dusky gopher frog.

Unit 6 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and its associated uplands on the WMA and has been given the name of Mayhaw Pond during ongoing recovery initiatives. We believe this area is essential for the conservation of the dusky gopher frog because it provides an important breeding site and associated forested uplands for recovery. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area of suitable habitat, into which dusky gopher frogs could be translocated, is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 7: Jackson County, Mississippi

Unit 7 encompasses 121 ha (299 ac) on State and private land in Jackson County, Mississippi. This unit is located approximately 4.2 km (2.6 mi) east of the intersection of State Hwy. 63 and State Hwy. 613; it is 3.8 km (2.4 mi) west of the Escatawpa River, and 3.2 km (2 mi) northeast of Helena, Mississippi. The portion of this unit in State ownership (107 ha (264 ac)) is 16th section land held in trust by the State of Mississippi as a local funding source for public education in Jackson County. The Jackson County School board has jurisdiction and control of the land. The balance of this unit is on private land (14 ha (35 ac)).

Unit 7 is currently occupied, but was not known to be occupied at the time of listing. The area, discovered in 2004 subsequent to the listing of the dusky gopher frog, contains a breeding pond named McCoy's Pond and associated uplands. We believe this area is essential for the conservation of the species because it provides an important breeding site and associated forested uplands for recovery of the dusky gopher frog. Currently, the State-owned portion of the area is managed for timber production by the Mississippi Forestry Commission for the Jackson County School Board. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, it may be at high risk of extirpation from stochastic events, such as disease or drought. Maintaining this area of currently occupied habitat for dusky gopher frogs is essential to decrease the risk of extinction of the species and provide for the species' eventual recovery.

Unit 8: Forrest County, Mississippi

Unit 8 encompasses 121 ha (299 ac) on Federal land in Forrest County, Mississippi. This unit is lo-

cated in the DNF approximately 1.9 km (1.2 mi) east of U.S. Hwy. 49, approximately 1.7 km (1.1 mi) south of Black Creek, and approximately 3.1 km (1.9 mi) southeast of the community of Brooklyn, Mississippi.

Unit 8 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and associated uplands that have been selected as a future dusky gopher frog translocation site during ongoing recovery initiatives. We believe this area is essential for the conservation of the species because it provides an important breeding site and associated forested uplands for recovery of the dusky gopher frog.

Unit 8 is being actively managed by the USFS to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat, into which dusky gopher frogs could be translocated, is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 9: Forrest County, Mississippi

Unit 9 encompasses 121 ha (299 ac) on Federal land and private land in Forrest County, Mississippi. The majority of this unit (120 ha (297 ac)) is located in the DNF and the balance (1 **[35,138]** ha (2.5 ac)) on private land. This unit is located approximately 3.9 km (2.4 mi) east of U.S. Hwy. 49, approximately 4.3 km (2.7 mi) south of Black Creek, and approximately 6.1 km (3.8 mi) southeast of the community of Brooklyn, Mississippi, at the Perry County line.

Unit 9 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and associated uplands that have been selected as a future dusky gopher frog translocation site during ongoing recovery initiatives. We believe this area is essential for the conservation of the species because it provides an important breeding site and associated forested uplands for recovery of the dusky gopher frog.

Most of Unit 9 is being actively managed by the USFS to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat, into which dusky gopher frogs could be translocated, is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 10: Perry County, Mississippi

Unit 10 encompasses 147 ha (363 ac) on Federal land and private land in Perry County, Mississippi. The majority of this unit (127 ha (314 ac)) is located in the DNF and the balance (20 ha (49 ac)) is located on private land. This unit is located at the intersection of Benndale Road and Mars Hill Road, approximately 2.6 km (1.6 mi) northwest of the intersection of the Perry County, Stone County, and George County lines and approximately 7.2 km (4.5 mi) north of State Hwy. 26.

Unit 10 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of two ponds and their associated uplands that have been selected as future dusky gopher frog translocation sites during

ongoing recovery initiatives. It provides the habitat for establishing new breeding ponds and metapopulation structure that will protect the dusky gopher frog from extinction. We believe this area is essential for the conservation of the dusky gopher frog because it provides two important breeding sites and their associated forested uplands for recovery of the dusky gopher frog.

Most of Unit 10 is being actively managed by the USFS to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at high risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat, into which dusky gopher frogs could be translocated, is essential to decrease the risk of extinction of the species and provide for the species' eventual recovery.

Unit 11: Perry County, Mississippi

Unit 11 encompasses 121 ha (299 ac) on Federal land and private land in Perry County, Mississippi. The majority of this unit (119 ha (294 ac)) is located in the DNF and the balance (2 ha (5 ac)) is located on private land. This unit borders the north side of Benndale Road northeast of the intersection of the Perry County, Stone County, and George County lines, approximately 6.4 km (4 mi) north of State Hwy. 26.

Unit 11 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and associated uplands that have been selected as a future dusky gopher frog translocation site during ongoing recovery initiatives. We believe this area is essential

for the conservation of the gopher dusky frog because it provides an important breeding site and associated forested uplands for recovery of the dusky gopher frog.

Most of Unit 11 is being actively managed by the USFS to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat, into which dusky gopher frogs could be translocated, is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 12: Perry County, Mississippi

Unit 12 encompasses 121 ha (299 ac) on Federal land and private land in Perry County, Mississippi. The majority of this unit (115 ha (284 ac)) is located in the DNF and the remaining balance (6 ha (15 ac)) is located on private land. This unit is located approximately 1.2 km (0.75 mi) east of Mars Hill Road, approximately 3.9 km (2.4 mi) north of the intersection of the Perry County, Stone County, and George County lines, and approximately 10.2 km (6.4 mi) north of State Hwy. 26.

Unit 12 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and its associated uplands that have been selected as a future dusky gopher frog translocation site during ongoing recovery initiatives. We believe this area is essential for the conservation of the dusky gopher frog because it provides an important breeding site and associated forested uplands for recovery of the dusky gopher frog.

Most of Unit 12 is being actively managed by the USFS to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events such as disease or drought. Maintaining this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the provisions of the Act, we determine

destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action **[35,139]** agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the Corps under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely

modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define "reasonable and prudent alternatives" (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with dis-

cretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for the dusky gopher frog. As discussed above, the role of critical habitat is to support life history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the dusky gopher frog. These activities include, but are not limited to:

(1) Actions that would alter the hydrology or water quality of dusky gopher frog wetland habitats. Such activities could include, but are not limited to, discharge of fill material; release of chemicals and/or biological pollutants; clearcutting, draining, ditching, grading, or bedding; diversion or alteration of surface or ground water flow into or out of a wetland (i.e., due to roads, fire breaks, impoundments, discharge pipes, etc.); discharge or dumping of toxic chemicals,

silt, or other pollutants (i.e., sewage, oil, pesticides, and gasoline); and use of vehicles within wetlands. These activities could destroy dusky gopher frog breeding sites; reduce hydroperiod below what is necessary for successful larval metamorphosis; and/or eliminate or reduce the habitat necessary for the growth and reproduction, and affect the prey base, of the dusky gopher frog.

(2) Forestry management actions in pine habitat that would significantly alter the suitability of dusky gopher frog terrestrial habitat. Such activities could include, but are not limited to, conversion of timber land to another use and timber management, including clearcutting, site preparation involving ground disturbance, prescribed burning, and unlawful pesticide application. These activities could destroy or alter the uplands necessary for the growth and development of juvenile and adult dusky gopher frogs.

(3) Actions that would significantly fragment and isolate dusky gopher frog wetland and upland habitats from each other. Such activities could include, but are not limited to, constructing new structures or new roads and converting forested habitat to other uses. These activities could limit or prevent the dispersal of dusky gopher frogs from breeding sites to upland habitat or vice versa due to obstructions to movement caused by structures, certain types of curbs, increased traffic density, or inhospitable habitat.

* * *

[35140] * * *

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. The statute on its face, as well as the legislative history, is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor in making that determination.

Under section 4(b)(2) of the Act, the Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion will not result in the extinction of the species.

Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as

critical habitat. In order to consider economic impacts, we prepared a draft economic analysis of the proposed critical habitat designation and related factors (Industrial Economics 2011, pp. 1–87). The draft analysis, dated August 17, 2011, was made available for public comment from September 27, 2011, through November 28, 2011 (76 FR 59774, 77 FR 2254) and again from January 17, 2012 through March 2, 2012 (77 FR 2254). Following the close of the comment periods, a final analysis ((FEA) dated April 6, 2012) of the potential economic effects of the designation was developed taking into consideration the public comments and any new information (Industrial Economics 2012, entire).

The intent of the FEA is to quantify the economic impacts of all potential conservation efforts for the dusky gopher frog; some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated economic impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline

costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at baseline costs that have been incurred since 2001 (year of the species' listing) (66 FR 62993), and uses this information to inform the economic analysis which quantifies those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe.

The FEA quantifies economic impacts of dusky gopher frog conservation efforts associated with the following categories of activity: Active species management, residential and commercial development, timber management, and military activities. The FEA estimates present value incremental impacts of critical habitat designation of $102,000, $20.5 mil-

lion, or $34.0 million according to three scenarios (applying a 7 percent discount rate). This equates to $9,610, $1.93 million, and $3.21 million in annualized impacts (applying a 7 percent discount rate). This approach was taken because most of the estimated incremental impacts are related to possible lost development value in Unit 1; considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities there; and potential exists for the Service to recommend conservation measures if consultation were to occur.

Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no Federal nexus (no Federal permit is required) triggering section 7 **[35,141]** consultation regarding dusky gopher frog critical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact. Therefore, all incremental economic costs will be attributed to the administrative costs of future section 7 consultations in all other units. Total present value of incremental impacts of critical habitat designation of the remaining units are $102,000 ($9,610 in annualized impacts) over the timeframe of the analysis (2012 to 2031), applying a 7 percent discount rate.

According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The devel-

opment would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate.

Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

The FEA also discusses the potential economic benefits associated with the designation of critical habitat. However, because the Service believes that the direct benefits of the designation are best expressed in biological terms, this analysis does not quantify or monetize benefits; only a qualitative discussion of economic benefits is provided.

Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts.

A copy of the FEA with supporting documents may be obtained by contacting the Mississippi Ecological Services Field Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov.*

* * *

[35,144] * * *

References Cited

A complete list of all references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Mississippi Ecological Services Field Office (see **ADDRESSES**).

Author

The primary author of this rulemaking is Linda LaClaire of the Mississippi Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation. **[35,145]**

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625,100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(11), the List of Endangered and Threatened Wildlife, as follows:

■ a. By removing the entry for "Frog, Mississippi gopher" under "AMPHIBIANS"; and

■ b. By adding an entry for "Frog, dusky gopher" in alphabetical order under "AMPHIBIANS" to read as follows:

§17.11 Endangered and threatened wild life.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common Name	Scientific Name						
*	*	*	*	*	*		*
AMPHIBIANS							
*	*	*	*	*	*		*
Frog, dusky, gopher	*Rana sevosa* ...	U.S.A. (AL, LA, MS)	Entire	E	718	17.95(d)	NA
*		*	*	*	*		*

§17.95—[Amended]

■ 3. In § 17.95, amend paragraph (d) by adding an entry for "Dusky Gopher Frog (*Rana sevosa*)," in the same alphabetical order that the species appears in the table at § 17.11(h), to read as follows:

§17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

Dusky Gopher Frog (*Rana sevosa*)

(1) Critical habitat units are depicted for St. Tammany Parish, Louisiana, and Forrest, Harrison, Jackson, and Perry Counties in Mississippi, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the dusky gopher frog are:

(i) *Ephemeral wetland habitat.* Breeding ponds, geographically isolated from other waterbodies and embedded in forests historically dominated by longleaf pine communities, that are small (generally <0.4 to 4.0 hectares (<1 to 10 acres)), ephemeral, and acidic. Specific conditions necessary in breeding ponds to allow for successful reproduction of dusky gopher frogs are:

(A) An open canopy with emergent herbaceous vegetation for egg attachment;

(B) An absence of large, predatory fish that prey on frog larvae;

(C) Water quality such that frogs, their eggs, or larvae are not exposed to pesticides or chemicals and sediment associated with road runoff; and

(D) Surface water that lasts for a minimum of 195 days during the breeding season to allow a sufficient period for larvae to hatch, mature, and metamorphose.

(ii) *Upland forested nonbreeding habitat.* Forests historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are

maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover and gopher tortoise burrows, small mammal burrows, stump holes, or other underground habitat that the dusky gopher frog depends upon for food, shelter, and protection from the elements and predation.

(iii) *Upland connectivity habitat.* Accessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites. This habitat is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements, such as that created by deep litter cover, clumps of grass, or burrows.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat unit maps.* Data layers defining map units were developed from USGS 7.5' quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(5) **Note**: Index map of the critical habitat units for the dusky gopher frog follows:

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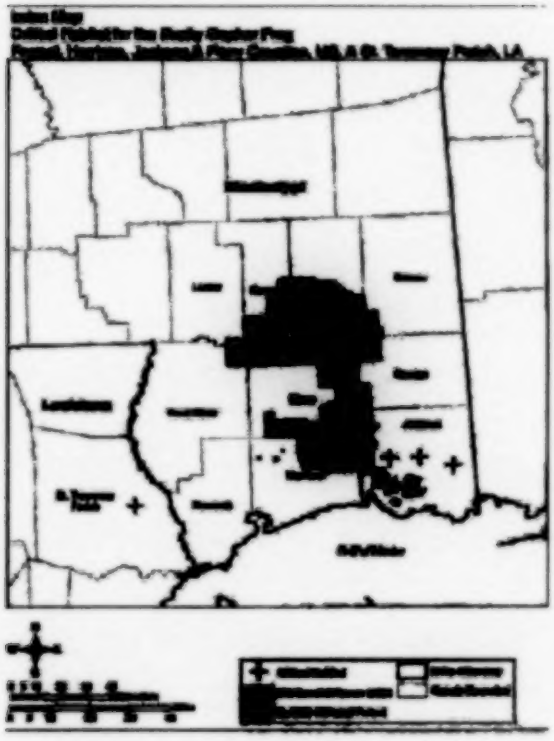

(6) Unit 1: St. Tammany Parish, Louisana.

(i) From USGS 1:24,000 quadrangle map Hickory, Louisiana. Land bounded by the following UTM Zone 16N, NAO 83 coordinates, (E, N): 228777, 3368004;

229406, 3365105; 229384, 3365104;

229362, 3365105; 229339, 3365106;

229317, 365108; 229295, 3365110;

229273, 3365114; 229252, 3365118;

229230, 3365123; 229209, 3365129;

229188, 3365136; 229167, 3365143;

229146, 3365151; 229126, 3365160;
229106, 3365170; 229086, 3365180;
229067, 3365191; 229048, 3365203;
229030, 3365215; 229012, 3365228;
228994, 3365242; 228977, 3365256;
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229580, 3365136; 229559, 3365129;
229537, 3365123; 229516, 3365118;
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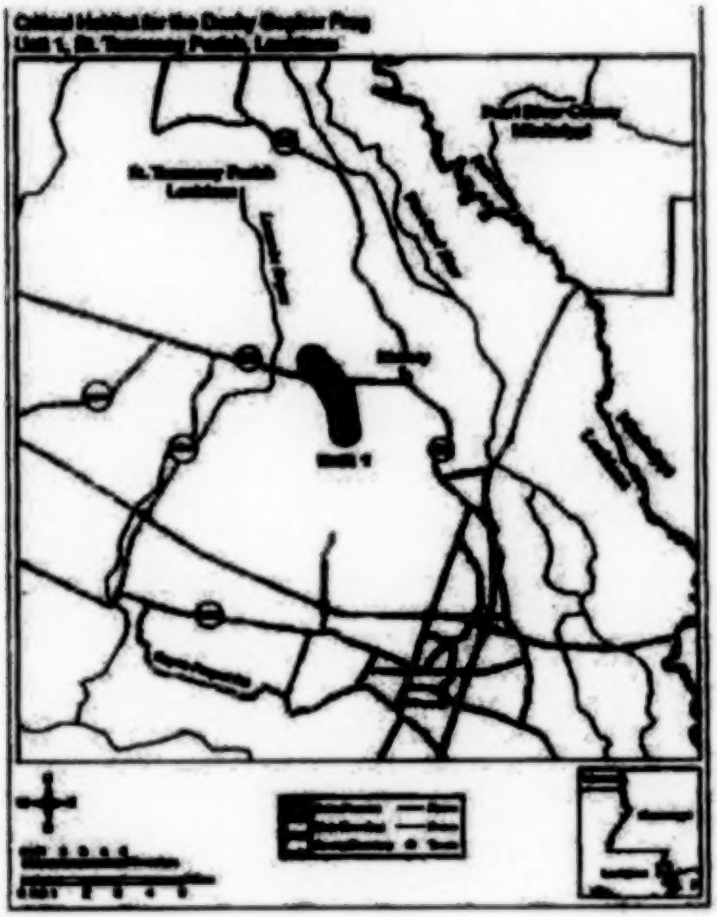
(ii) **Note**: Map of Unit 1 follows: **[35,148]**



* * *

[35,161] * * *

Dated: May 29, 2012

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

* * *

Erratum to Petition Appendix

The following two diagrams were mistakenly omitted from the Petition Appendix. They originally appeared in Judge Jones's opinion dissenting from Denial of Rehearing En Banc.

The following diagram should have appeared after the last paragraph at Pet. App. 137a.

Figure 1: Under the ESA, a species' critical habitat is necessarily a subset of the species' habitat.

JA201

The following diagram should have appeared after the first paragraph at Pet. App. 138a.

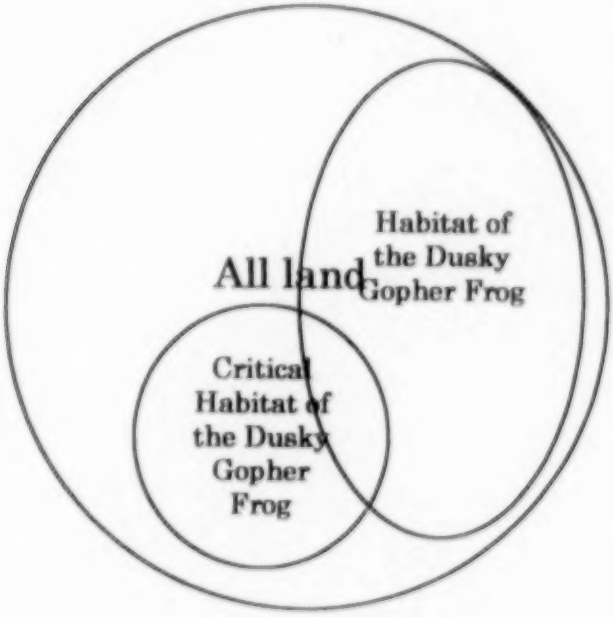


Figure 2: The panel majority's erroneous belief that the ESA has no habitability requirement means that, as the panel majority held here, land that is uninhabitable by a species can nonetheless be its critical habitat.

No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.

PARTIES TO THE PROCEEDINGS BELOW

Additional plaintiffs-appellants below, respondents here by operation of Rule 12.6, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are also petitioners in No. 17-74.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of the Interior.

Intervenor-defendants-appellees below, respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a and JA200-201 (Erratum)) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2016. Its order denying rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. The timely filed petition was granted on January 22, 2018. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in the addendum to this brief. FWS's final rule listing the dusky gopher frog as endangered appears at 66 Fed. Reg. 62993 (Dec. 4, 2001). FWS's final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012) and reproduced at JA99-199.

STATEMENT

Congress enacted the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (ESA or Act), to provide "a program for the conservation" of endangered species and to conserve "ecosystems upon which [they] depend." *Id.* § 1531(b). To that end, Section 4 of the Act requires the Secretary of the Interior to identify endangered species and to "designate *any habitat of*

such species which is then considered to be *critical habitat*." *Id.* § 1533(a)(3)(A) (emphasis added). Section 3 defines "critical habitat" as certain areas "occupied by the species," as well as other "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service (FWS or Service) designated as critical habitat of the endangered dusky gopher frog 1544 acres of private land in Louisiana, which it labeled as Unit 1. Petitioner Weyerhaeuser operates that property by periodically harvesting and regrowing commercial loblolly pine (*i.e.*, closed canopy) forests. FWS designated Unit 1 though no dusky gopher frog has been seen on that property for more than 50 years and the frog cannot live there absent a radical change in land use because the land lacks basic features necessary for the frog to survive.

The dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. 35118, 35131 (June 12, 2012), JA152-154; 50 C.F.R. § 17.95(d), JA192.

First, for breeding, the frog needs small, isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds, where it lives for the vast majority of the year when it is not breeding. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover."

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and "abundant native herbaceous" groundcover produced by frequent fires.

These features are the "habitat characteristics required to sustain the [frog's] life-history processes." 77 Fed. Reg. 35131, JA152-153. If one is missing, the frog will not survive. *E.g.*, JA45-46. But Unit 1, the Service found, "contains one" feature only: breeding ponds. *Ibid.*, JA154. FWS conceded that Unit 1 "do[es] not currently contain" the other "essential physical or biological features of critical habitat" for the frog. *Id.* at 35131, 35135, JA154, 167.

Specifically, in a dense, closed-canopy loblolly pine forest like Unit 1, treetops meet and block out light from the forest floor. Lack of sunlight and of prescribed fires prevent the growth of the herbaceous groundcover that the frog needs to live. See 66 Fed. Reg. 62993, 62999 (Dec. 4, 2001). By contrast, widely spaced trees in fire-maintained longleaf pine forests that provide frog habitat have an open canopy, allowing in sunlight that "support[s] a diverse ground cover of herbaceous plants." 77 Fed. Reg. 35129, JA144-145.

The Fifth Circuit—over a panel dissent and six-judge dissent from denial of en banc review—upheld the Service's designation of this non-habitat as "critical habitat" for the frog. That was legal error.

Congress's command in the ESA's operative provision that the Service "shall * * * designate any habitat of [a listed] species which is then determined to be critical habitat" on its face mandates that "critical habitat" be a subset of "habitat of such species." Nothing in the definition of "critical habitat" to include both occupied and unoccupied habitat alters that foundational command. Statutory context and legislative history confirm that Congress did not intend unoccupied critical habitat to be a free-floating concept available to FWS whenever land contains a single component of a listed species' habitat, even when other

components the species needs to survive are missing. Critical habitat must first be habitat, and it should be more difficult, not easier, to deem unoccupied habitat as critical than occupied habitat.

The Fifth Circuit made a second error. The Service acknowledged that the critical habitat designation could cost Unit 1's landowners up to $34 million in lost development value. But it refused to exclude the property under 16 U.S.C. § 1533(b)(2), which allows the Secretary to exclude an area from designation if the benefits of exclusion outweigh the benefits of designation. 77 Fed. Reg. 35140-41, JA185-190. The Fifth Circuit held that the Service's decision not to exclude Unit 1 from designation is not subject to judicial review for lack of a judicially manageable standard.

To the contrary, there is a familiar standard by which courts may review the Service's determination not to exclude from designation: abuse of discretion. Here, the Service abused its discretion because it failed to consider substantial reasons to exclude Unit 1 from designation or adequately to justify its decision.

For these reasons, this Court should reverse the decision below.

A. The Endangered Species Act

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). FWS is charged with developing and implementing a "recovery plan" to achieve the conservation of each listed species. 16 U.S.C. § 1533(f).

ESA Section 7, 16 U.S.C. § 1536(a)(2), "requires each federal agency to 'insure that any action

authorized, funded, or carried out by such agency'" is "'not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary * * * to be critical.'" *Bennett*, 520 U.S. at 158.[1]

If a federal agency believes that its proposed action may adversely affect critical habitat, "it must engage in formal consultation with [FWS]," which "provide[s] the agency with a written statement" explaining "how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). The agency must then "either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 652 (2007) (*NAHB*).

Section 7 means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits" to private parties, adversely modifies or destroys critical habitat. *Sweet Home*, 515 U.S. at 692. The requirement "cover[s], in effect, almost anything that an agency might do." *NAHB*, 551 U.S. at 664.

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[1] Section 9 makes it unlawful to "take" listed species (16 U.S.C. § 1538(a)(1)), which includes "'significant habitat modification where it actually kills or injures wildlife.'" *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 690-691 (1995), quoting 50 C.F.R. § 17.3 (1994). The "take" prohibition is not at issue here because it is undisputed that no dusky gopher frog is or could be present on Unit 1.

The list of federal actions that may require Section 7 consultation is a long one. It includes the U.S. Army Corps of Engineers' consideration of an application for a permit to discharge fill material into wetlands under Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344. Other examples are Federal Energy Regulatory Commission "oversight of gas pipeline and powerline rights-of-way" and "Federal Highway Administration [provision of] federal funds" for "road construction." 66 Fed. Reg. 62993, 63000 (Dec. 4, 2001). And any federal contract,[2] any federal loan or loan guarantee,[3] or the provision of flood insurance by the Federal Emergency Management Agency,[4] among a host of other federal actions, could trigger Section 7 consultation. See 50 C.F.R. § 402.02 ("Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including "the promulgation of regulations," "granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid"); ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES 105-106 (Donald Bauer & Wm. Robert Irvin, eds., 2d ed., 2010).

ESA Section 5, 16 U.S.C. § 1534(a), authorizes the Secretary to further the Act's conservation goals by "acquir[ing] by purchase, donation, or otherwise, lands, waters, or interest therein." That provision, as this Court pointed out in *Sweet Home*, is well suited to

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[2] *E.g.*, *Defs. of Wildlife* v. *Bureau of Ocean Energy Mgmt.*, 871 F.Supp.2d 1312, 1322 (S.D. Ala. 2012) (agency approval of oil and gas leases).

[3] *E.g.*, *Buffalo River Watershed Alliance* v. *Dep't of Agriculture*, 2014 WL 6837005, at *5 (E.D. Ark. Dec. 2, 2014) (loans from the Small Business Administration and Farm Service Agency).

[4] *E.g.*, *Florida Key Deer* v. *Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008).

address land "that is not yet but may in the future become habitat for [listed] species." 515 U.S. at 703. When it enacted the ESA in 1973, Congress contemplated that "land acquisition" for "protection of habitat" on "non-public lands" would be a major component of species conservation, comprising a third of the ESA program's annual budget. S. Rep. No. 93-307, at 4 (1973), reprinted in S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 303 (Comm. Print 1982) (LEG. HIST.); H.R. Rep. No. 93-412, at 20 (1973), LEG. HIST. 159.[5]

B. The ESA's Critical Habitat Provisions

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation requirement. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 34 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

In June 1978, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would "result in total destruction of the snail darter's habitat," the statute

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[5] Non-governmental organizations are active acquirers of land and easements for conservation. *E.g.*, Nature Conservancy, *About Us: Private Lands Conservation*, perma.cc/QB8T-WWNX. The Nature Conservancy owns or manages parts of the Mississippi critical habitat for the dusky gopher frog. *Mississippi: Explore Our Work*, perma.cc/LC2C-X9XH; see also perma.cc/U5UV-RG74.

required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

Months earlier, FWS had finalized a regulation defining critical habitat as

> any air, land, or water * * * and constituent elements thereof, the loss of which would appreciably decrease the likelihood of survival and recovery of a listed species * * *. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

43 Fed. Reg. 870, 874-875 (Jan. 4, 1978).

The Tellico Dam decision and 1978 critical habitat regulation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13 (1978), LEG. HIST. 737. House Bill 14104 responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, LEG. HIST. at 749. Though based on the 1978 critical habitat regulation, the House bill eliminated reference to "additional areas for reasonable population expansion." H.R. 14104, 95th Cong. § 5(1) (2d Sess. 1978), LEG. HIST. 715; see also S. Rep. No. 95-874, at 10 (1978), LEG. HIST. 948 (distinguishing between "true critical habitat" and designations "to extend the range of an endangered species," over which the report expressed "particula[r] concer[n]").

In its report on the bill, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, LEG. HIST. 742.[6]

Subsequent amendments to House Bill 14104, and competing Senate Bill 2899 (LEG. HIST. 1169), abandoned the 1978 regulation as a model and moved towards the current definition of critical habitat. See James & Ward, *supra*, 34 J. ENVTL. L. at 18-21.

As ultimately enacted, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

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[6] Individual legislators expressed concern about "the extremes to which the act [had been] carried" (LEG. HIST. 1006 (Sen. Garn)), including that "designation of critical habitat" operated as "zoning from Washington, D.C." *Id.* at 821 (Rep. Murphy). See James & Ward, *supra*, 34 J. ENVTL. L. at 14-15.

16 U.S.C. § 1532(5)(A).

The adopted amendments also provided that, except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." 16 U.S.C. § 1532(5)(C). See James & Ward, *supra*, 34 J. ENVTL. L. at 15-26 (detailing history of 1978 amendment). This statutory language has not changed since 1978.

Representative Murphy (a sponsor) emphasized in the hearing on the Conference Report that the end result was "[a]n extremely narrow definition of critical habitat." 124 Cong. Rec. 38665 (Oct. 14, 1978), LEG. HIST. 1221.

C. The Critical Habitat Regulations

At the time FWS designated critical habitat for the dusky gopher frog in 2012, its regulations provided that "[i]n determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection." 50 C.F.R. § 424.12(b) (2012). These features included

> (1) Space for individual and population growth, and for normal behavior;
>
> (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
>
> (3) Cover or shelter;
>
> (4) Sites for breeding * * *; and generally;
>
> (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species.

Ibid. The rule directed the Secretary to "focus" on the "primary constituent elements" "within the defined area that are essential to the conservation of the species," which may include "spawning sites, feeding sites, seasonal wetland" and "vegetation type." *Ibid.*

The regulation also directed the Secretary to designate as critical habitat "areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

In 2016 the Service amended the critical habitat rule to omit this "inadequacy" limitation on unoccupied habitat designation. 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). It asserted that "unoccupied [critical habitat] areas do not have to presently contain any of the physical or biological features" that a species needs. *Id.* at 7427. It stated—citing (only) the district court's decision in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Ibid.* The Service warned that "critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing." *Id.* at 7435.[7]

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[7] Twenty States challenged the 2016 rule as inconsistent with the ESA and arbitrary and capricious. First Am. Compl., *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala. Feb. 2, 2017) (Dkt. 30). That case settled (Dkt. 55, 56 (Mar. 15, 2018)), with the agencies agreeing to reconsider the 2016 regulations. FWS did not agree to revisit the designation at issue in this case, which was improper not as a matter of agency discretion but because it violates the ESA and the Administrative Procedure Act. No amount of tinkering with the critical habitat rule will eliminate the designation of Weyerhaeuser's property or

D. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

1. Dusky gopher frogs are "terrestrial amphibians endemic to the longleaf pine ecosystem." 77 Fed. Reg. 35129, JA144. "They spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.*, JA144-145. Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Connectivity" of "breeding and nonbreeding habitat * * * must be maintained to support the species' survival." 77 Fed. Reg. 35130, JA148.

"Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." Pet. App. 85a n.7; see 77 Fed. Reg. 35130, JA149; 66 Fed. Reg. 62999 ("fire is the only known management tool" to maintain frog habitat; "Appropriate burning regimes must be maintained to prevent woody encroachment and to enhance herbaceous growth"); JA45-46.

Thus the three "habitat characteristics required to sustain the [frog's] life-history processes," or "primary constituent elements" (PCEs), FWS concluded, are ephemeral wetlands, upland forest, and upland areas connecting the two. 77 Fed. Reg. 35131, JA152-154. Essential to all three habitat elements are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*, JA153-154.

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change the plain command of the statute, which leaves FWS with no discretion to designate non-habitat like Unit 1.

Many open-canopy "longleaf pine dominated uplands have been converted to pine plantations" of loblolly or slash pine, which produce a closed canopy that blocks sunlight needed for herbaceous grasses to grow, or have been lost to urbanization. FWS, *Dusky Gopher Frog Recovery Plan* 11 (July 23, 2015), perma.cc/C9TQ-DJZU (*Recovery Plan*). Less than two percent of original longleaf pine forested habitat remains. 66 Fed. Reg. 62997. The use of prescribed fire as a management tool also has been reduced. *Recovery Plan* at 11. While "[f]ire is needed to maintain the natural longleaf pine community," it can destroy loblolly pine forests and is inappropriate for developed areas. 66 Fed. Reg. 62999.

FWS's *Recovery Plan* (at 11) explains how sites are managed to create habitat for the frog. "Prescribed fire is being used at * * * sites being managed as potential translocation sites" to create "open canopy and native groundcover vegetation." "[A]ctive management" also includes "planting longleaf pine [and] restoring native groundcover vegetation." *Ibid.*; see also JA46.

2. FWS designated the frog as endangered in 2001, estimating the extant population at 100 frogs at one site in the DeSoto National Forest in Mississippi. 66 Fed. Reg. 62995.[8] But it did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

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[8] FWS listed the "Mississippi gopher frog," observing that "surveys have been unable to document the continuing existence" of the frog in Louisiana or Alabama. 66 Fed. Reg. 62994-95. In 2012's final designation FWS renamed the frog the dusky gopher frog (*Rana sevosa*), though it remains confined to Mississippi. 77 Fed. Reg. 35118, JA102.

FWS acknowledges that the frog is found only in Mississippi. It nevertheless designated as critical habitat 1544 acres of commercial forest in St. Tammany Parish, Louisiana, known as Unit 1. Unit 1 is 50 miles from where the frog lives, and the frog has not been seen on Unit 1 "since the 1960s." Pet. App. 86a; see 77 Fed. Reg. 35146, JA194; JA58.

FWS designated Unit 1 because it contains five isolated ponds into which FWS believed "dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. 35135, JA167. But FWS acknowledged that apart from these ponds Unit 1 "do[es] not currently contain the essential physical or biological features of critical habitat." *Ibid.*[9]

FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." 77 Fed. Reg. 35123, JA122. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129, JA144-145), FWS deemed Unit 1's designation "essential for the conservation of the species." FWS reasoned that because, with many changes, Unit 1 could provide "habitat for population expansion,"

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[9] Peer reviewers FWS relied upon during rulemaking understood that the frog cannot inhabit ponds without associated upland habitat. One observed that "conservation emphasis" on "seasonal/semipermanent wetlands" must be matched by "equal emphasis" on "the large areas of surrounding habitat used by adults (and juveniles) during the 10 or 11 months of the year when not breeding." He pointed to the frog's "unusually specific upland habitat requirements" of "open canopy longleaf pine savannahs" that are "maintained by fire." Comments of Dr. Michael J. Lannoo, JA23-26; see also Comments of William Blihovde, JA45-46.

designation was "essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery." *Id.* at 35135, JA167.

Reflecting that ponds alone cannot support the frog, FWS did not designate as critical habitat only the ponds on Unit 1, but also 1544 acres surrounding them. The Service arrived at these boundaries by starting at the ponds, then using data on the distances that dusky gopher frogs and other gopher frogs have been observed to travel, then adding a buffer zone, then connecting all these areas together. 77 Fed. Reg. 35120, 35130, JA107-108, 147-149; *Recovery Plan* at 10.

3. FWS reported in 2015 that "three naturally-occurring populations [of dusky gopher frogs] supported by four breeding ponds" have now been documented in Mississippi on federal- or State-owned land. *5-Year Review: Summary and Evaluation* 12 (2015), perma.cc/24DJ-KQHP. A fourth breeding population has been established on Nature Conservancy-owned land by translocation. *Ibid.* Fourteen ponds have been restored or created on federal, State, and Nature Conservancy land for future translocations. *Ibid.* In addition, an active captive breeding program has produced a population of 550 frogs at 16 zoos. *Recovery Plan* at 26.

E. FWS's Economic Analysis

ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog* ¶ 70 (Apr. 6, 2012) ("Final Econ. Analysis"), JA80. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners undertook comprehensive planning for future development, obtaining zoning changes and local approvals. *Id.* ¶¶ 70-72, JA80-83. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." *Id.* ¶ 73, JA83.[10]

FWS recognized that designation of Unit 1 could interfere with the planned development. If ponds on the land fall within CWA jurisdiction, development would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions.[11] FWS

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[10] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 percent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis ¶ 71, JA81-82. The Parish Council opposed the critical habitat designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011), JA28-31.

[11] The Final Economic Analysis assumed (at ¶ 74) that a CWA permit is the only federal nexus that could trigger a Section 7 consultation. Roads and FERC-licensed gas pipelines that cross Unit 1, or other federal connections involved in large residential

calculated that permit conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value ("Scenario 2"). If development were prohibited altogether, the loss would be $33.9 million ("Scenario 3"). Final Econ. Analysis ¶ 87, JA91-92; 77 Fed. Reg. 35140-41, JA185-190. This "reduction in land value occurs immediately at the time of designation." Final Econ. Analysis ¶ 73, JA83. FWS did not quantify any other costs, including the cost of restoring Unit 1 to habitat.

FWS acknowledged that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. 35141, JA189. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Ibid.*, JA190.

F. The District Court's Decision

The landowners brought ESA and Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, it "[r]eluctantly" upheld the designation. *Ibid.*

G. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote after an "extremely limited and highly deferential" review of the designation. Pet. App. 6a. It rejected the

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and commercial developments, also could trigger consultation. *Supra*, pp. 5-6.

landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." Pet. App. 60a.

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a and JA200-201. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." Pet. App. 142a.

Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical

habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. Pet. App. 142a-150a.

Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." Pet. App. 155a.

Finally, the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*. Pet. App. 156a-162a.

SUMMARY OF ARGUMENT

The Fifth Circuit erroneously upheld the designation of Unit 1 as critical habitat.

I. Unit 1 is not critical habitat as a matter of law.

A. The ESA requires that critical habitat be habitable. Section 4(a)(3) limits designations to "habitat." Areas in which a species cannot survive are not habitat. It is undisputed that the frog cannot live in Unit 1.

The term "critical habitat" also requires habitability. It means "habitat" that is "critical" to the species. Congress intended that designations generally must be narrower than, or at most coextensive with, "the entire geographical area which can be occupied" by the species. 16 U.S.C. § 1532(5)(C). That language demands habitability.

Section 3's definition of "critical habitat" is in accord. The "occupied" clause requires habitability. And the unoccupied clause is more demanding. It focuses not on the "essential" "features" of habitat, but on "essential" "areas." Areas that lack the features

essential to species' life-processes cannot be essential for conservation.

The ESA's structure reflects a habitability requirement. Section 7 applies only to "habitat" that is "critical." This Court interpreted Section 7 in *Hill* to require the presence of habitat. Congress then added parallel language to Section 4(a)(3), demonstrating its intent for Section 4(a)(3) to be interpreted similarly. Legislative history confirms that Congress intended an "extremely narrow" definition of critical habitat.

The constitutional avoidance canon likewise compels a narrow reading of "critical habitat." Reading the ESA to give FWS power to designate non-habitat would impinge significantly on States' traditional powers over land use. And federal regulation of land on which a non-commercial species does not and cannot live raises substantial Commerce Clause concerns.

B. The Fifth Circuit's ruling impermissibly expands the scope of the ESA. It perversely makes it easier for FWS to designate unoccupied land than occupied land as critical habitat. And its reading has no limiting principles. Vast portions of the United States could be designated as critical habitat if a single feature used by an endangered species is present. There is no legal basis for this expansion of agency power.

C. A ruling for petitioner would not prevent conservation. ESA Section 5 allows FWS to purchase land, regardless whether it is critical habitat. Section 6 allows FWS to fund State conservation efforts, which often include partnering with nongovernmental organizations to purchase land or conservation easements. Section 10(j) allows FWS to work with landowners by releasing experimental populations while prohibiting critical habitat designation. Those and other tools are more equitable than designation.

They also are more effective; FWS has railed for decades about the ineffectiveness and cost of critical habitat designations.

II. The panel erroneously refused to review FWS's decision not to exclude Unit 1 from designation under ESA Section 4(b)(2).

A. Exclusion decisions are judicially reviewable. This Court so concluded in *Bennett* v. *Spear*. Bedrock principles of administrative law support that conclusion. This Court applies a strong presumption favoring judicial review of agency action, and nothing in the ESA overcomes that presumption.

B. The Fifth Circuit's reasons for barring judicial review lack merit. It erroneously presumed that FWS's actions are *un*reviewable. It incorrectly ruled that courts may review only decisions to exclude, when decisions *not* to exclude require the same cost-benefit analysis by FWS. And it failed to recognize that the familiar abuse-of-discretion standard of review is available and administrable.

C. FWS abused its discretion in not excluding Unit 1 from designation. FWS did not consider all costs. And it did not sufficiently explain its one-sentence conclusion that tens of millions of dollars in costs imposed by the designation are not "disproportionate" to the "biological" benefits. This Court should hold that FWS abused its discretion in not excluding Unit 1 from designation, or at a minimum remand for judicial review under the abuse-of-discretion standard.

ARGUMENT

I. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

This Court should reverse the judgment below because the designation of Unit 1 as critical habitat

violates the ESA and the Administrative Procedure Act. "'Congress has directly spoken to the precise question at issue'" in "clear and conclusive" terms. *Digital Realty Trust* v. *Somers*, 138 S. Ct. 767, 781-782 (2018).

A. The ESA Requires Designated Areas To Be Habitable.

The Fifth Circuit's decision rests on its erroneous holding that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. The ESA's language does impose a habitability requirement. The statutory structure, legislative history, and canons of construction all confirm that reading. As a matter of law, uninhabitable Unit 1 is not critical habitat of the dusky gopher frog.

1. Statutory Text Limits Designations To Habitat.

The sole provision authorizing critical habitat designations contains an unmistakable habitability requirement. Section 4(a)(3) provides that FWS shall "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). The panel correctly cited this provision as the source of FWS's "statutory duty to designate" critical habitat. Pet. App. 32a. But the panel failed to recognize its import.

Section 4(a)(3) is unambiguous that critical habitat "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J., dissenting). As FWS explained, "'habitat' and 'critical habitat'" are "distinct." U.S. Br. in Opp. 22. Designated areas must be habitat because Congress required *both* "habitat" *and* "critical habitat" to be present. The "irreducible minimum" of designated critical habitat "is that it *be habitat*." Pet. App. 137a

(Jones, J.); see *Sweet Home*, 515 U.S. at 703 ("habitat that has been designated 'critical' pursuant to § 4").

Section 4(a)(3)'s "habitat" requirement must be given effect. "It is the 'cardinal principle of statutory construction'" and this Court's "duty 'to give effect, if possible, to every clause and word of a statute.'" *Bennett*, 520 U.S. at 173. And Section 4(a)(3) is the "operative provision" on designations; Section 3's definition of "critical habitat" "pertains only to one term" of the operative provision. Pet. App. 137a (Jones, J.). Section 4(a)(3) prohibits the designation of "critical habitat" that is not "habitat."

The ESA does not define "habitat." But the word has an "ordinary, contemporary, common meaning." *Octane Fitness* v. *ICON Health & Fitness*, 134 S. Ct. 1749, 1756 (2014). And that "ordinary understanding" of habitat excludes uninhabitable land. *Sweet Home*, 515 U.S. at 687.

"Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976); see *Sweet Home*, 515 U.S. at 697 (consulting WEBSTER'S THIRD in interpreting the ESA); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) ("the kind of place that is natural for the life and growth of an organism").

The U.S. Forest Service defined "habitat" contemporaneously as the "natural environment" or "locality where the organism may generally be found, and where all essentials for its development and

existence are present." Charles Schwarz, *et al.*, USDA Forest Service, *Wildland Planning Glossary* 91 (1976), perma.cc/S2SU-ES2Y. Ecological texts defined habitat as "denot[ing] a rather specific kind of living space" containing "physical and biologic factors which provide at least minimal conditions for one organism to live." Rexford Daubenmire, PLANT COMMUNITIES: A TEXTBOOK OF PLANT SYNECOLOGY 4 n.* (1968). To this day, the Service's ESA Handbook defines "habitat" as "[t]he location where" an "animal lives and its surroundings," including "the presence of a group of particular environmental conditions surrounding an organism." *Habitat Conservation Planning Handbook* Glossary G-14 (Dec. 21, 2016), perma.cc/CX9A-8LMH.

International conventions are in accord. The Convention on Migratory Species states that "'[h]abitat' means any area in the range of a migratory species which contains suitable living conditions for that species." Convention on the Conservation of Migratory Species of Wild Animals, art. I, § 1(g) (1979). The Convention on Biological Diversity defines "habitat" as "the place or type of site where an organism or population naturally occurs." Convention on Biological Diversity, art. 2 (1992).

Those definitions do not cover Unit 1, where suitable living conditions do not exist and the frog cannot naturally survive. This fact is "undisputed." Pet. App. 49a (Owen, J.). The Service found that Unit 1 "contains" only "one" of three "habitat characteristics required to sustain the species' life-history processes": breeding ponds. 77 Fed. Reg. 35131, JA152-154. Adult frogs spend 8 to 17 days each year in these ponds. *Recovery Plan* at 8.

FWS recognized that Unit 1's "uplands"—where the "frogs spend most of their lives"—"do not currently

contain the essential physical or biological features of critical habitat." 77 Fed. Reg. 35130, 35135, JA150, 167. Unit 1's uplands lack the "longleaf pine[s]," "frequent" fires, "open canopy and abundant herbaceous ground cover" that provide "food, shelter, and protection" for the frog. *Id.* at 35131, JA153. Instead, "Unit 1 is covered with a closed-canopy forest of loblolly pines." Pet. App. 72a (Owen, J.). And as FWS acknowledged, "loblolly" pine "plantations" with "a closed-canopy forest" are "*unsuitable as habitat for dusky gopher frogs.*" 77 Fed. Reg. 35129, JA145 (emphasis added).

Unit 1 therefore does not provide the frogs with an environment for "feeding[] and sheltering," which "are what animals do." *Sweet Home*, 515 U.S. at 710 (O'Connor, J., concurring). If dusky gopher frogs were moved to Unit 1, they would not survive. No reasonable definition of "habitat" includes this land.

Given these undisputed facts, Unit 1 cannot be designated as critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat," which is "fundamentally at odds with the ESA's text." Pet. App. 138a (Jones, J.).

2. The Term "Critical Habitat" Requires Habitability.

The statutory term "critical habitat" also requires habitability. Section 3 defines "critical habitat" to mean: (i) "occupied" areas that contain "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and (ii) unoccupied "areas" that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A). By using the term "critical habitat" rather than "critical

features" or the like, Congress again made clear that critical habitat must be "habitat."

Although "critical habitat" is defined, the words retain "independent significance" by "showing us what Congress had in mind." *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*). "Words are to be given the meaning that proper grammar and usage would assign them." Antonin Scalia & Bryan A. Garner, READING LAW 140 (2012). In ordinary usage, adjectives modify and thereby limit nouns. See *Henson* v. *Santander Consumer USA*, 137 S. Ct. 1718, 1720 (2017) (adjectives "describe the present state of the nouns they modify"); *United States* v. *Garcia*, 857 F.3d 708, 713 (5th Cir. 2017) (adjectives "modif[y] (and hence limi[t]) the noun"); *Bayer CropScience* v. *Dow AgroSciences*, 728 F.3d 1324, 1329 (Fed. Cir. 2013) ("adjective suggest[s] a narrowing of the broader class identified by the noun"). The adjective-noun term "critical habitat" implies "habitat" that is "critical." The Fifth Circuit's holding that "critical habitat" includes *non*-habitat is an abuse of ordinary language.

3. Section 3(5)(C) Cements The Habitability Requirement.

ESA Section 3(5)(C) provides that, "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." 16 U.S.C. § 1532(5)(C). The words "can be occupied"—*not* "is occupied"—shows that this provision governs occupied *and* unoccupied critical habitat. And "can be occupied" *means* habitable. Congress envisioned critical habitat to be *at most coextensive with*, and almost always narrower than, all habitable areas. The Fifth Circuit's ruling, which allows FWS to designate

critical habitat *beyond* the species' habitat, contradicts statutory text and Congress's intent.

4. The "Critical Habitat" Definition Requires Habitability.

a. Section 3's definition of critical habitat confirms this reading. The "occupied" clause presupposes that the property has the features necessary to support the species: the species could not occupy the property were it not habitable. And the property must contain "features" "essential" to conservation of the species that "may require special management considerations or protection." This definition requires "habitability," as the panel understood. Pet. App. 23a.

The "unoccupied" clause is "more demanding." *Home Builders Ass'n* v. *U.S. Fish & Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010). The text focuses not on habitat "features," but habitat "areas." See *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 119 (D.D.C. 2004) ("it is not enough that the area's features be essential to conservation, the area itself must be essential"). "Given the narrower scope of 'feature' than 'area,' it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard)." Pet. App. 144a (Jones, J.). "[A] broader and more complex investigation" is required for designating unoccupied habitat. *Id.* at 145a.

"[A]reas" that lack the features that FWS deems "essential to the conservation of the species"—here, the three "primary constituent elements" of ephemeral wetlands, open canopy, fire-maintained uplands, and similar connective pathways—cannot be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A). There is nothing "essential" about land on which a

species *cannot* survive. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable"); see also *Ayestas* v. *Davis*, 138 S. Ct. 1080, 1093 (2018).

Those definitions do not cover Unit 1, which "will not support" the frog. Pet. App. 48a (Owen, J.). As 18 States explained, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there." Br. of Ala. *et al.* as *Am. Cur.* in Support of Pet. for Cert. at 4.

b. To transform Unit 1 into frog habitat, the landowners would have to

- chop down the "closed-canopy" "loblolly" trees and plant "open-canopied" "longleaf" pines;
- burn Unit 1 with "frequent fires" to "support a diverse ground cover of herbaceous plants," despite "acknowledge[d]" "landowner concern" and "negative impacts" of such fires;
- terminate century-long, "on-going timber management of the site, which precludes burning or planting longleaf pine trees";
- allow "60 percent" or "100 percent" of Unit 1 to be "managed" as "refuge for the frog," at a cost of "$20.4 million" or "$33.9 million" in "lost development value"; *and*
- agree "voluntar[ily]" to "frog translocations."

77 Fed. Reg. 35123-24, 35126, 35129, 35141, JA121, 123, 132, 145, 189. "[T]here is no evidence" that these

"substantial alterations" "will, or are likely to, occur." Pet. App. 48a (Owen, J.). FWS's mere "hope to work with the landowners" by forcing radical land-use changes at tens of millions of dollars of landowner expense does not authorize the conclusion that Unit 1 is "habitat" or "essential" to the frog's conservation. *Ibid.*; 77 Fed. Reg. 35123, JA123. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.).

The Service's designation of Unit 1 is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). Because it is at odds with the statutory text and "not in accordance with law," it violates the ESA and the APA, 5 U.S.C. § 706(2)(A).

5. The Statutory Structure Shows That Critical Habitat Must Be Habitable.

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *NAHB*, 551 U.S. at 666. The ESA's "[s]urrounding provisions" and "structure" reflect a habitability requirement. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

As the panel explained, critical habitat designations operate "primarily" through Section 7 consultation. Pet. App. 9a. Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 16 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4(a)(3), Section 7 is unambiguous that *critical* habitat must be *habitat*.

This language is almost entirely original to the 1973 Act, which mentioned critical habitat *only* in Section 7. See Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). "From the very beginning, Congress rooted the concept of critical habitat in the relevant species' actual habitat." Pet. App. 136a (Jones, J.). This Court acknowledged that fact in *Hill*. There, it read Section 7's "plain words" as providing that, if "habitat [is] destroyed," the "Act would then have no subject matter to which it might apply." 437 U.S. at 186 n.32. The Court thus recognized that Section 7's applicability hinges on the presence of "habitat."

That same interpretation should govern Section 4(a)(3)'s parallel language. "[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012). The fact that Congress in 1978 responded to *Hill* by adding nearly identical language to Section 4(a)(3) demonstrates its intent for Section 4(a)(3) to be interpreted similarly. "Congress is presumed to be aware" of this Court's "interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009).

Congress reiterated its focus on "habitat" in other ESA provisions. *E.g.*, 16 U.S.C. § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered); *id.* § 1537a(e)(2)(B) (requiring FWS to cooperate with foreign nations in identifying "habitats upon which [migratory birds] depend").[12]

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[12] Other provisions confirm that Congress's focus was on actual habitat. Section 4(b) instructs FWS to give notice of a

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the plain language reading that "critical habitat" must be "habitat" that "sustain[s] the species' life-history processes." 77 Fed. Reg. 35131, JA152-153.

6. Legislative History Reflects A Habitability Requirement.

The legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat." Pet. App. 137a n.4 (Jones, J.). The 1973 Act did not define critical habitat, which was mentioned only in Section 7. The agencies then defined critical habitat to include "any portion of the present habitat of a listed species, which may include additional areas for reasonable population expansion." 43 Fed. Reg. 875. Congress viewed that regulation as overbroad and amended the ESA in 1978 to limit critical habitat.

Congress was concerned that the agencies' "regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, LEG. HIST. 749. The House "narrow[ed]" the

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proposed critical habitat designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

definition and told the agencies to be "exceedingly circumspect in the designation of critical habitat outside of the presently occupied areas of the species." *Id.* at 18, 25, LEG. HIST. 742, 749. The Senate Report declared that there is "little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species' continued survival." S. Rep. No. 95-874, at 10, LEG. HIST. 948.

After the conference approved language that became Section 3, Representative Murphy explained that the final bill retained "[a]n extremely narrow definition of critical habitat." 124 Cong. Rec. 38665, LEG. HIST. 1221. But the Fifth Circuit's interpretation is extremely broad, allowing FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25, LEG. HIST. 749. That "is the opposite of what Congress declared." Pet. App. 149a (Jones, J.).

7. *The Avoidance Canon Favors A Narrow Reading Of Habitat.*

"[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

a. FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision

"signals a huge potential expansion of [FWS's] power effectively to regulate privately- or State-owned land." Pet. App. 143a (Jones, J.).

Just ask St. Tammany Parish, where Unit 1 is located. It opposes the designation for "usurp[ing]" its land-use authority. Br. of St. Tammany Parish as *Am. Cur.* in Support of Pet. for Cert. 2. St. Tammany is Louisiana's "fastest growing Parish" and the "primary refuge of thousands" who "fled their homes from the onslaught of Hurricane Katrina." *Id.* at 1-2. After a "stringent comprehensive rezoning process," the Parish rezoned Unit 1 for development as a neighborhood because the land is "out of harm's way in the inevitable event" of "hurricanes" and "flooding." *Id.* at 5-6. St. Tammany protests that the designation of Unit 1 as critical habitat "adversely affects" this development and reduces its "tax base hindering local government from meeting the needs of its growing population." *Id.* at 1; see also JA28-31.

The Parish warns too of "serious public safety concerns" over the burning necessary to create frog habitat. St. Tammany *Am.* Br. 3. Burns "have created in the past, and will create in the future, hazards" that could spell "disaster" for the nearby "community of Hickory," whose "rural fire district [has] limited equipment and manpower." *Id.* at 7. And fire imperils the "critical east-west transportation route" of Highway 36, which runs through Unit 1. *Id.* at 3. FWS gave these concerns the back of its hand, assuring that "experts" would do the burning and lost tax revenue is "not expected." 77 Fed. Reg. 35126, 35127, JA132, 135. The Parish disagrees.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*,

547 U.S. at 738 (plurality); see *SWANCC*, 531 U.S. at 174 (finding no clear congressional expression of "a desire to readjust the federal-state balance"). There is no such plain statement in the ESA. The Service's claim of authority to designate unoccupied critical habitat based on a single feature that is not sufficient to support the life of a listed species extends the reach of critical habitat designations to vast areas of the Nation, turning federal regulators in a super zoning authority. See Pet. App. 154a-156a (Jones, J.). To stretch the statutory language to allow FWS to intrude so far into state and local land use powers distorts our federalism. The avoidance canon counsels otherwise.

b. FWS's designation also tests the boundaries of federal commerce power. "The Commerce Clause empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and spend most of their lives underground. FWS found no commercial value in them or in the designation of their critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. 35141, JA189. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it

does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied non-habitat as critical habitat. *SWANCC*, 531 U.S. at 174.

B. The Fifth Circuit's Erroneous Ruling Vastly Expands The ESA.

The Fifth Circuit's decision to jettison habitability destroys the ESA's built-in limitations. The panel perversely "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). And its logic has no stopping point. Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" *Id.* at 49a (Owen, J.).

1. The Ruling Below Perversely Makes It Easier To Designate Unoccupied Areas Than Occupied Habitat.

The Fifth Circuit read the ESA to impose a "*less* stringent" standard for designating "unoccupied critical habitat" as compared to "occupied critical habitat." Pet. App. 142a (Jones, J.). It held that "*occupied* land" requires "habitability," but "*unoccupied* land" does not. Pet. App. 23a. On that basis it upheld FWS's designation while admitting that Unit 1 "currently lack[s] 'the essential physical or biological features of critical habitat.'" *Id.* at 26a n.17.

That "remarkable and counterintuitive" holding "conflicts with the ESA's text" and "drafting history." Pet. App. 142a-143a (Jones, J.). It also breaks from "*all* relevant precedent," which uniformly embraced the

"commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." *Id.* at 142a, 149a; see *Home Builders Ass'n*, 616 F.3d at 990 ("the standard for unoccupied habitat" is "more demanding" than the standard for "occupied critical habitat"); *Ariz. Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); *Cape Hatteras*, 344 F.Supp.2d at 125 ("Designation of unoccupied land is a more extraordinary event than designation of occupied lands"). "[M]ost troubling," the panel "refused to address" how its expansive interpretation makes any sense given Congress's expressed intent to *limit* designations of unoccupied areas. Pet. App. 150a (Jones, J.).

2. *The Fifth Circuit's Interpretation Has No Limiting Principles.*

FWS's approach has no meaningful limit. The Fifth Circuit's failed attempts to cabin FWS's designation authority prove the point.

The Fifth Circuit first cited the regulation in effect at the time of Unit 1's designation, which required FWS to find occupied habitat "inadequate" before it considered unoccupied areas. Pet. App. 27a-28a. But by the time of the panel's decision, FWS had eliminated that inadequacy requirement. FWS determined that "the Act does not require" an inadequacy finding, which it called "unnecessary and unintentionally limiting." 81 Fed. Reg. 7424, 7434. The panel thus upheld the designation under *Chevron* based on a rationale that the agency had rejected.

Regardless, it is hardly a significant limit on federal power to say that uninhabitable land may be designated on the basis of a single feature that cannot

support the species, whenever occupied land is "inadequate" for species conservation. As the designation here shows, FWS can readily assert that the likelihood of a species' conservation improves if more land is pressed into service as critical habitat.

The panel also tried to draw a line at "land that is *objectively* impossible to use for conservation," such as "a toxic spill zone that scientists concluded could not be remediated." Pet. App. 29a n.18. That is a minor limitation at best. And with enough time and money, nearly any toxic spill zone *could be* remediated; cities could be razed; a greenhouse for tropical species could be erected in Alaska. The Fifth Circuit's "objectively impossible" test allows virtually all land to be designated as critical habitat, which courts must then review under a "most deferential" standard. *Id.* at 16a.

There also is no limiting principle in FWS's assertion that frog habitat in Unit 1 is "restorable with reasonable effort." Pet. App. 26a n.17. So-called "reasonable effort" here means that Unit 1's owners must lose $20 to $34 million before any restoration begins to take place. It then requires them to rip out their loblolly forests, terminate their century-long timber operations, plant and grow longleaf pines, actively manage the land with fire, and permit frog translocation. FWS calculated *none* of these restoration costs; it just declared them "reasonable" and then persuaded the Fifth Circuit that courts could not review its cost-benefit analysis. Under a restoration standard, any land could be designated as critical habitat because "it is theoretically possible" that "land could be modified to sustain" a species. Pet. App. 49a (Owen, J.).

Finally, the panel claimed that the "scientific consensus as to the presence and rarity" of a single

"feature" of habitat—the ponds—"justified [FWS's] finding that Unit 1 was essential for the conservation" of the frog. Pet. App. 29a. The panel held that "if the ponds are essential, then Unit 1, which contains the ponds, is essential." *Id.* at 30a n.20. As Judge Owen noted, this was "*the linchpin* to the majority's holding." *Id.* at 64a. That holding is deeply flawed.

To begin with, it "re-writes the Endangered Species Act." Pet. App. 65a. A single "feature"—out of three features the frog needs to survive—does not make an "area" into "habitat" that is "essential" to the frog's conservation. 16 U.S.C. § 1532(5)(A)(i). The panel "smuggl[ed] 'feature' into the definition of unoccupied critical habitat" and then eviscerated the requirement by saying that a single feature is sufficient. Pet. App. 149a (Jones, J.).

Moreover, the "rarity" of the ponds as a limiting principle is "illusory." Pet. App. 154a (Jones, J.). "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions" on when a feature is "rare *enough*." *Id.* at 154a-155a. The standard bestows "virtually limitless" authority on FWS considering the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting platforms,' 'forested areas within 0.5 mile'" of those trees, "'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" *Id.* at 155a. "With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a. The standard is "a judicial rubber stamp on agency action." *Id.* at 155a.

So too here. The panel deemed five Unit 1 ponds unusual enough to warrant the designation, though subsequent events show that ponds can be created or restored for frog translocation (*5-Year Review* at 12, 22), and that frogs can be "raised in cattle tanks." *Recovery Plan* at 6.

In short, the panel's opinion "threatens to expand the Service's power in an 'unprecedented and sweeping' way." Pet. App. 156a. The Court should reverse that decision and restore the ESA's limits on FWS's designation authority.

C. The ESA Offers Better Ways To Achieve Conservation.

Many conservation tools remain if the Court limits the ESA's critical habitat provisions to their plain terms. A ruling for the landowners would not affect the designation of critical habitat in which a species actually lives or in which it could thrive. And ESA Section 9 still would prohibit takes of endangered species, including "significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3; see *Sweet Home*, 515 U.S. at 696-707.

Even for unoccupied non-habitat that FWS hopes to convert into habitat, the ESA provides solutions. As the panel acknowledged, FWS could "manage Unit 1 by purchasing the land." Pet. App. 32a. ESA Section 5 authorizes the Secretary to "acquire by purchase, donation, or otherwise, lands, waters, or interest therein" "to conserve fish, wildlife, and plants." 16 U.S.C. § 1534(a)(2). Section 5 is not limited to "habitat" and therefore is *broader* than Section 4(a)(3). It is ideally suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species," as this Court pointed out in *Sweet Home*. 515 U.S. at 703; see Richard A. Epstein, *Babbitt*

v *Sweet Home Chapters of Oregon: The Law and Economics of Habitat Preservation*, 5 SUP. CT. ECON. REV. 1, 25 (1997) ("acquisition of land that is not presently usable by habitat could only be accomplished under [Section 5], since no habitat is either modified or destroyed").

Congress saw Section 5 as an important conservation tool. The Senate stressed that "an accelerated land acquisition program is essential" and "[o]ften" the "only means of protecting endangered animals which occur on non-public lands." S. Rep. No. 93-307, at 4 (1973), LEG. HIST. 303. Senator Tunney, floor manager of the bill, explained that under Section 5, "we will be able to conserve habitats necessary to protect fish and wildlife from further destruction." 119 Cong. Rec. 25669 (July 24, 1973), LEG. HIST. 358.

The House emphasized that Section 5 "expanded" federal authority to acquire habitat "us[ing] funds" without "specific authorizations." H.R. Rep. No. 93-412, at 9 (1973), LEG. HIST. 148. Representative Sullivan, floor manager for the House bill, explained that Section 5 enabled agencies "to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves." 119 Cong. Rec. 30162 (Sept. 18, 1973), LEG. HIST. 192. The House envisioned that a third of ESA costs would be devoted to land acquisition. H.R. Rep. No. 93-412, at 20, LEG. HIST. 159. And the Conference Report explained that Section 5 provided "adequate authority" to "acquire habitat which is critical to the survival of [listed] species." H.R. Conf. Rep. No. 93-740, at 25 (1973), LEG. HIST. 450.

If FWS wants to conscript Unit 1 into frog habitat and translocate the frog there, Section 5 provides the

appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners. And as Judge Mikva recognized in *Sweet Home*, Section 5 "suggests a type of intervention more complex and proactive than simply forbidding certain activities on private lands," and "[f]ederal wildlife managers can surely do more to help such species on government-owned and controlled preserves than they could ever accomplish on private lands." 1 F.3d 1, 10 (D.C. Cir. 1993) (Mikva, J., concurring).

ESA Section 6 also offers solutions. It authorizes FWS to "provide financial assistance to any State" with a "conservation progra[m]" and enter "cooperative agreement[s]" that fund up to 90% of States' conservation efforts. 16 U.S.C. § 1535(d). FWS has agreements with most States and provided $56 million in federal funding in FY2016. *Cooperative Endangered Species Conservation Fund Grants* 1 (Sept. 2016), perma.cc/4DWV-68U2. Section 6 also allows FWS to enter agreements with States to "administ[er] and manag[e]" "area[s] established for the conservation" of species. 16 U.S.C. § 1535(b). The 1973 House saw Section 6 as accounting for 29% of the ESA's costs, meaning that the *majority* of ESA expenses were intended for federal acquisitions and State grants. H.R. Rep. No. 93-412, at 20, LEG. HIST. 159.

FWS and States in addition frequently work with non-governmental organizations, which are active acquirers of land and conservation easements. The Nature Conservancy, for example, owns and manages ponds in Mississippi where the frog lives and is assisting that State with habitat restoration. *Supra*, p. 7 n.5.

ESA Section 10(j) is another tool allowing FWS to work with private landowners. It authorizes the release of "experimental populations" into unoccupied areas. 16 U.S.C. § 1539(j). But it softens the regulatory blow to landowners by "treat[ing]" these populations as "threatened"—not endangered. *Id.* § 1539(j)(2)(C). And unless the experimental population is "essential to the continued existence of a species"—which FWS never seems to have found—*Section 10(j) prohibits the designation of that land as "critical habitat."* *Id.* § 1539(j)(2)(C)(ii); see *Forest Guardians* v. *U.S. FWS*, 611 F.3d 692, 702 n.14 (10th Cir. 2010). Congress added Section 10(j) in 1982 to "'encourage private parties to host such populations.'" *Id.* at 705. FWS's attempt to coerce private parties into hosting such populations through critical habitat designation of non-habitat upends that congressional purpose.

If none of these voluntary options work, "in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved," the ESA authorizes FWS to effect a "regulated taking" and provide just compensation. 16 U.S.C. § 1532(3); *e.g.*, *Calf Island Cmty. Trust, Inc.* v. *Young Mens Christian Ass'n of Greenwich*, 392 F.Supp.2d 241, 245-246 (D. Conn. 2005).

Any of these tools is more equitable to a private landowner than critical habitat designation. That is especially so when the designation costs the landowner $20 to $34 million in lost development value for a species that was last seen on the land before the ESA's enactment and that cannot live there now.

These tools also work better than critical habitat designations. For decades, FWS has railed against designations and "seriously question[ed]" their "utility." 62 Fed. Reg. 39129, 39131 (July 22, 1997). "In

30 years of implementing the Act," FWS explained after it listed the frog, "we have found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources." 69 Fed. Reg. 59996, 59996 (Oct. 6, 2004); see 64 Fed. Reg. 31871, 31872 (June 14, 1999).

FWS has been "inundated with citizen lawsuits" demanding designations, which "consum[e] large amounts of conservation resources." 64 Fed. Reg. 31872. As a result, "species not yet listed" as endangered are "facing extinction while precious resources are being depleted on critical habitat litigation support." *Id.* at 31873. Designations are "driven by litigation rather than biology" and "impos[e] huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). Indeed, they are "the most costly and least effective class of regulatory actions [FWS] undertakes." *H.R. 3824, Threatened and Endangered Species Recovery Act of 2005: Legislative Hearing Before the H. Comm. on Res.*, 109th Cong. 29 (2005) (statement of Craig Manson, Assistant Secretary for FWS).

This case corroborates those views. FWS listed the frog in 2001, immediately benefitting the frog under ESA Sections 7 and 9. In 2007, respondent CBD sued FWS for not designating critical habitat. See 77 Fed. Reg. 35119, JA103-104. It took until 2012 to finalize the designation. *Ibid.* Since then, Unit 1's owners have fought in administrative and judicial proceedings the designation of private land on which the frog does not live and cannot survive. In the meantime, cooperative efforts on federal, State and conservation-group owned land—none of which appear to depend on a critical habitat designation—have brought the frog to new

sites, and a captive breeding program has increased the population five-fold.

The designation also provides no guarantee that the frog will benefit. In the first scenario posited by FWS, "no conservation measures are implemented" because Unit 1 has "no Federal nexus" to "trigge[r] section 7 consultation." 77 Fed. Reg. 35140-41, JA188. Under that scenario there is no benefit at all to the frog. Under Scenario 3, FWS finds a federal nexus and prohibits all development "due to the importance" of Unit 1, resulting in loss of $33.9 million to the landowners. *Id.* at 35141, JA189. Because development is banned under that scenario, Unit 1's owners have no incentive to "create frog habitat." Pet. App. 77a (Owen, J.). In all likelihood, Unit 1 would remain a commercial loblolly pine forest.

The intent, therefore, of a designation like this one is captured in Scenario 2. Scenario 2 requires "60 percent" of Unit 1 to be managed as frog refuge—at a loss of $20.4 million in value to the landowners—in exchange for the right to develop the other 40 percent of the land. 77 Fed. Reg. 35124, 35141, JA124, 188-189. Only the "coercive pressure" of that sort of government shakedown can benefit the frog. *Koontz* v. *St. Johns River Water Management Dist.*, 570 U.S. 595, 607 (2013). Yet there is no guarantee that the landowners will agree to being strong-armed out of 60 percent of their land. They could instead forego CWA permitting or other federal involvement and continue to operate Unit 1 as a commercial forest, with no benefit to the frog.

FWS's expansive construction of its powers inflicts severe costs on landowners and affected communities with no guarantee of any benefit to the frog. Especially given other tools that allow FWS, States, and private

organizations to work with Unit 1's owners, the Court should interpret ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent: narrowly, to exclude non-habitat.

II. The Service's Decision Not To Exclude Unit 1 From Critical Habitat Designation Is Subject To Judicial Review.

The Fifth Circuit also erred in refusing to review the Service's decision not to exclude Unit 1 from critical habitat designation under ESA Section 4(b)(2).

Section 4(b)(2) mandates that FWS "shall designate critical habitat * * * after taking into consideration the economic impact" and "any other relevant impact" of "specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). It then states that FWS "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.*

The Fifth Circuit read Section 4(b)(2) to prohibit courts from reviewing FWS's decisions not to exclude areas from designation. Pet. App. 32a-36a. It therefore refused to review FWS's decision not to exclude Unit 1, which rested on FWS's finding that the tens of millions of dollars in costs from designating Unit 1 were not "disproportionate" to the "biological" benefits. 77 Fed. Reg. 35141, JA189-190.

As six members of the Fifth Circuit recognized, the panel's approach "play[s] havoc" with settled precedent regarding the availability of judicial review and "abdicat[es]" courts' "responsibility to oversee, according to the APA, agency action." Pet. App. 156a, 162a.

A. Courts May Review Exclusion Decisions Under ESA Section 4(b)(2).

Decisions not to exclude areas from critical habitat designation are judicially reviewable. This Court so concluded in *Bennett* v. *Spear*. There, the Court agreed with the Service that Section 4(b)(2)'s language that "[t]he Secretary *may* exclude any area from critical habitat" vests the Service with "discretion." 520 U.S. at 172. But the Court also ruled that the Service's "ultimate decision" whether to exclude areas from designation under Section 4(b)(2) "*is reviewable*" for "*abuse of discretion*." *Ibid.* (emphasis added).

Bennett answers the second question presented by our petition: decisions not to exclude areas from critical habitat designation are "reviewable." 520 U.S. at 172. The Fifth Circuit did not "confront, much less distinguish, *Bennett*." Pet. App. 161a (Jones, J.).

Bedrock principles of administrative law reinforce *Bennett*'s holding. "Judicial review of administrative action is the norm in our legal system." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1656 (2015). "[T]his Court applies a 'strong presumption' favoring judicial review." *Id.* at 1651. "[T]he agency bears a 'heavy burden'" in overcoming that presumption and must show that the "statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Ibid.*

Nothing in the ESA overcomes the strong presumption favoring judicial review. To the contrary, Section 4(b)(2)'s text and context show that courts must be permitted to review exclusion decisions.

Section 4(b)(2) *requires* FWS to "tak[e] into consideration the economic impact" of designations and authorizes FWS to exclude areas if "the benefits of such exclusion outweigh the benefits" of designation.

These are not independent provisions; they must be "interpreted holistically." Pet. App. 160a n.21 (Jones, J.). Together, they make "economic consequences" an "explicit concern of the ESA" and advance Congress's "primary" "objective" of "avoid[ing] needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-177. The Fifth Circuit thwarted that congressional objective by prohibiting courts from guarding against needless economic dislocation.

The Fifth Circuit's ruling also subverts Congress's requirement that FWS "shall designate critical habitat * * * after taking into consideration the economic impact" of designation. 16 U.S.C. § 1533(b)(2). That language calls for *reasoned judgment*. The Fifth Circuit's ruling reduces that statutory command to empty formalism, providing no protection when FWS capriciously refuses to exclude areas from designation though the costs of designation outweigh the identified benefits.[13]

Congress did not make economic impact a consideration in whether to *list* a species. See 16 U.S.C. § 1533(a)(1). Designation of critical habitat is therefore the only opportunity to limit "needless economic

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[13] The 1978 House Report indicates that, after *Hill*, Congress added Section 4(b)(2) to "avoid conflicts" with "Federal activities at an early stage." H.R. Rep. No. 95-1625, at 13, 16. The report states that "[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion." *Id.* at 17. That language shows that the House intended to confer broad discretion, but does not bar courts from reviewing FWS's exclusion decisions to determine if they are arbitrary or capricious or an abuse of discretion.

dislocation" on the front end of the regulatory process. *Bennett*, 520 U.S. at 176.

Without judicial review, "compliance with the law would rest in the [Service's] hands alone." *Mach Mining*, 135 S. Ct. at 1652. This Court "need not doubt the [Service's] trustworthiness, or its fidelity to law, to shy away from that result." *Ibid.* "We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence." *Id.* at 1652-1653. It is imperative that exclusion decisions be reviewable.

B. The Fifth Circuit's Justifications For Prohibiting Judicial Review Are Erroneous.

Without citing these precedents, the Fifth Circuit concluded that exclusion determinations under Section 4(b)(2) are unreviewable because they are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That holding rests on several errors.

First, instead of presuming reviewability, the court presumed *un*reviewability. It reasoned that, because Section 4(b)(2) "establishes a discretionary process by which the Service *may* exclude areas from designation" but "does not articulate any standard governing when the Service *must* exclude an area," the agency's "decision not to act" is "'presumptively unreviewable.'" Pet. App. 35a. That holding contradicts the "'strong presumption' favoring judicial review of administrative action." *Mach Mining*, 135 S. Ct. at 1651.

Permissive phrasing in a statute indicates that Congress has given the agency discretion. But discretion is no barrier to judicial review. *E.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983) (decisions under statute providing that agency "may correct any military record" when it "considers it necessary" "are subject to judicial review"); *Dickson* v.

Sec'y of Def., 68 F.3d 1396, 1401-1402 & n.7 (D.C. Cir. 1995) ("may" suggests that "Congress intends to confer some discretion on the agency," not that "the matter is committed exclusively to agency discretion"); *Beno* v. *Shalala*, 30 F.3d 1057, 1066-1067 (9th Cir. 1994) ("the mere fact that a statute contains discretionary language does not make agency action unreviewable"). Indeed, the APA expressly *authorizes* review of agency action for "abuse of discretion." 5 U.S.C. § 706(2)(A). The fact that Congress gives an agency broad latitude does not mean that it has "left *everything*" to the agency. *Mach Mining*, 135 S. Ct. at 1652.

Second, the panel reasoned that Section 4(b)(2) "articulates a standard for reviewing the Service's decision to exclude an area" but "is silent on a standard for reviewing the Service's decision to *not* exclude an area." Pet. App. 35a. The panel's recognition that courts may review decisions *to exclude* should have compelled the conclusion that courts also may review decisions *not to exclude*. Section 4(b)(2) contemplates a single, unitary designation of critical habitat (as occurred here). Whatever is "not excluded" from that designation necessarily is "included," and vice versa. As Judge Jones put it, "the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes" that "the Service's decision to include Unit 1 as critical habitat is judicially reviewable." Pet. App. 160a n.21.

In reviewing a decision to exclude that does not cause extinctions, courts must analyze whether FWS validly "determine[d] that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2). That cost-benefit analysis is capable of judicial review. Courts should review that same analysis regardless of

whether the Service ultimately decides to exclude or not to exclude the area from designation.

Third, and relatedly, the Fifth Circuit's incorrectly held that courts lack a "manageable standard" to review a "decision not to exercise [FWS's] discretionary authority to exclude an area" from designation. Pet. App. 35a. The familiar abuse-of-discretion standard, adopted by this Court in *Bennett* (520 U.S. at 172), provides a manageable standard.

On review for abuse of discretion, agency action is set aside if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or is otherwise "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This standard requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Ibid.* The panel identified no reason why this standard could not be applied to FWS's exclusion decisions under Section 4(b)(2).

Finally, the panel incorrectly relied on *Heckler* v. *Chaney*, 470 U.S. 821 (1985). Pet. App. 33a-35a. *Heckler* arose in a unique context: judicial review of an agency's decision not to enforce the statute it is charged with administering. Non-enforcement decisions, this Court explained, pose unique challenges for judicial review. They turn not just on legal or factual conclusions within the agency's expertise, but also on policy judgments about allocation of agency resources and its priorities. 470 U.S. at 831. Non-

enforcement does not involve the exercise of "*coercive* power over an individual's liberty or property rights." *Id.* at 832. And non-enforcement "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict"—a decision constitutionally committed to the Executive. *Ibid.* Those considerations led the Court to conclude that non-enforcement decisions, in contrast to the mine-run of agency action, should be presumptively *un*reviewable under the APA. *Id.* at 832-833.[14]

None of those factors pertain to FWS's Section 4(b)(2) determinations. Designating property as critical habitat—or not excluding it from designation—exercises coercive power over landowners' property rights and so implicates one of the core "areas that courts often are called upon to protect." 470 U.S. at 832. Determining the scope of a designation does not involve policy judgments about how to balance limited agency resources. And there is no parallel constitutionally committed power that is immune from judicial review.

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[14] Contrary to the panel's suggestion (Pet. App. 35a), *Heckler* does not hold that permissive statutory language reverses the presumption of reviewability. *Heckler* holds only that agencies' *non-enforcement* decisions are presumptively unreviewable. 470 U.S. at 835; see *Franklin* v. *Massachusetts*, 505 U.S. 788, 818-819 (1992) (Stevens, J., concurring) ("the Court has limited the exception to judicial review provided by 5 U.S.C. § 701(a)(2) to cases involving national security" or "seeking review of refusal to pursue enforcement actions," "areas in which courts have long been hesitant to intrude"). Only *after* establishing that presumption did the Court examine the statute's permissive language to decide whether petitioners had overcome the presumption.

To be sure, designating critical habitat implicates the Service's expertise. But expertise—assuming that the agency acts within its statutory authority to begin with—justifies "narrow" review, not no review. *State Farm*, 463 U.S. at 43. An agency still must "articulate" a "rational connection between the facts found and the choice made," so that "*expertise*, the strength of modern government," does not "become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962).

C. FWS Abused Its Discretion In Refusing To Exclude Unit 1 From Designation.

This case exemplifies why judicial review of Section 4(b)(2) exclusion determinations is important and administrable.

The Service determined that designating Unit 1 as critical habitat would eliminate up to $33.9 million in present value of land, which mostly has been held by a family for generations. 77 Fed. Reg. 35140-41, JA186-190. FWS estimated "present value incremental impacts" to "the remaining units" at $102,000, meaning that Unit 1 constituted more than 99 percent of the economic impact of the entire designation. *Id.* at 35140, JA187. FWS did not point to any offsetting economic benefits from Unit 1's designation. As the dissenters below observed, the "shocking fact" was that "there is virtually nothing on the other side of the economic ledger." Pet. App. 158a.

FWS asserted that the "benefits of the designation are best expressed in biological terms." 77 Fed. Reg. 35141, JA189. And its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Ibid.*, JA190. "Consequently," FWS chose not to exclude Unit 1 from the designation. *Ibid.*

FWS's decision does not withstand scrutiny.

It is not clear that FWS engaged in the correct cost-benefit analysis. Section 4(b)(2) unambiguously requires an area-specific analysis: FWS must weigh "the benefits" of "exclud[ing] any area" (*i.e.*, Unit 1) against "the benefits of specifying such area." The Service's invocation of "biological" benefits, however, appears to relate to the designation *as a whole*. See 77 Fed. Reg. 35141, JA189 (the "benefits of the designation are best expressed in biological terms"); *id.* at 35127, JA137 ("the benefits of the proposed rule are best expressed in biological terms"). If so, the Service did not consider the correct factors and its decision not to exclude was "not in accordance with law." 5 U.S.C. § 706(2)(A); see *State Farm*, 463 U.S. at 43 (agency acts arbitrarily when it "relied on factors which Congress has not intended it to consider" or "entirely failed to consider an important aspect of the problem").

FWS also failed adequately to explain its decision. "[A]n agency must cogently explain why it has exercised its discretion in a given manner" to allow courts to conclude that it exercised "reasoned decision-making." *State Farm*, 463 U.S. at 48, 52. It must "articulate" a "rational connection between the facts found and the choice made." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). Despite declaring that "the benefits of the proposed rule were best expressed in biological terms that can then be weighed against the expected costs," FWS did not engage in any discernible weighing. 77 Fed. Reg. 35127, JA137-138. It did not quantify or explain the supposed biological benefit of designating Unit 1 except in speculative and contingent terms. Nor did it explain why it was appropriate to impose tens of millions in costs in exchange for that benefit. It simply stated that the economic costs of designation were "not dispro-

portionate" to the benefits. *Id.* at 35141, JA190. There is nothing "cogent" about that one-sentence conclusion.[15]

FWS's analysis of the economic costs of designation also was incomplete. See *State Farm*, 463 U.S. at 43 (agency must not "fai[l] to consider an important aspect of the problem"). The Service never calculated the costs of creating frog habitat in Unit 1, which includes terminating timber operations, planting longleaf pines, and applying frequent burns. FWS did not factor in the stigma costs that arise on top of lost development value because land designated as critical habitat is less desirable to purchasers. FWS did not quantify the potential loss of oil and gas production. 77 Fed. Reg. 35126-27, JA132-133; see also JA92 ¶ 88.

FWS focused solely on the costs to Unit 1's owners, even though St. Tammany Parish has slated the parcel for development and stands to lose tax revenue from the designation. FWS pointed to other supposedly developable land, but without any analysis of the Parish's plans, the comparative attractiveness of different sites for development, or the fact that this site has already been rezoned for a large development. 77 Fed. Reg. 35127, JA135.

While refusing to consider real costs, FWS speculated wildly about "biological" benefits. Any biological benefit from designating Unit 1 is far more uncertain than the costs that FWS discounted. FWS admitted that "habitat management" and "frog

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[15] The report FWS commissioned to support its economic analysis was similarly deficient. JA63-98. The report briefly discussed a handful of "weak[] and speculative" economic benefits (on which FWS did not rely), then ended "abruptly" "with no weighing or comparison of costs or benefits." Pet. App. 158a (Jones, J.).

translocations" to Unit 1 are "voluntary" and there are "no existing agreements with the private landowners of Unit 1 to manage this site" as frog habitat. 77 Fed. Reg. 35123, JA123. It did not quantify the "acknowledge[d]" costs of burning Unit 1 to create habitat because "critical habitat designation does not allow the Service to require burning" and burning was therefore "uncertai[n]." 77 Fed. Reg. 35126, JA132. Yet these are *preconditions* for obtaining *any* biological benefit out of Unit 1. FWS's conclusion that there are uncertain costs but biological benefits contradicts "the evidence before the agency" and is thoroughly "implausible." *State Farm*, 463 U.S. at 43; see U.S. Dep't of Interior, *The Secretary's Authority to Exclude Areas from Critical Habitat Designation Under Section 4(b)(2) of the Endangered Species Act* 24 (Oct. 3, 2008), perma.cc/XD97-7D4A ("the Secretary must weigh whatever benefits of exclusion or inclusion he identifies as relevant *in an even-handed and logically consistent way*") (emphasis added).

Finally, FWS's bottom-line determination that the costs of the designation are not disproportionate to the benefits is "implausible." *State Farm*, 463 U.S. at 43. A loss of tens of millions of dollars in value to land owned mostly by a family is a severe economic hardship. The loss to St. Tammany Parish of an important development in an area safe from hurricane ravages is also significant. On the other side of the balance, the biological benefits to designation are theoretical, especially when "[t]he only evidence in the record is that the owners do not plan to" modify Unit 1 to create frog habitat. Pet. App. 76a. Faced with staggering costs and speculative benefits, the Service's conclusion that costs were not disproportionate to benefits is the essence of arbitrary agency action.

The foregoing analysis shows that judicial review is not only presumptively available, but feasible in practice. The "very narrow" exception to judicial review for actions committed to agency discretion by law applies only where "it is impossible to evaluate agency action for 'abuse of discretion.'" *Heckler*, 470 U.S. at 830. It is certainly possible to discern an abuse of discretion here.

FWS's failure to consider all relevant factors or explain its weighing is manifest on the face of the administrative record. This Court may itself decide that FWS's determination was an abuse of discretion. In the alternative, this Court should remand for the lower courts to apply the correct standard of review in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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STATUTORY AND REGULATORY ADDENDUM

16 U.S.C. § 1532. Definitions [ESA § 3]

For the purposes of this chapter—

* * *

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

* * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the

Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

* * *

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

* * * * *

16 U.S.C. § 1533. Determination of endangered species and threatened species
[ESA § 4]

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * *

(b) Basis for determinations

* * *

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available,

that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * *

(f) Recovery plans

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. * * *

* * * * *

16 U.S.C. § 1534. Land acquisition [ESA § 5]

(a) Implementation of conservation program; authorization of Secretary and Secretary of Agriculture

The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act,

as amended, and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc.

Funds made available pursuant to chapter 2003 of Title 54 may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

* * * * *

16 U.S.C. § 1535. Cooperation with States [ESA § 6]

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

* * * * *

16 U.S.C. § 1536. Interagency cooperation [ESA § 7]

(a) Federal agency actions and consultations

* * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * * *

16 U.S.C. § 1538. Prohibited acts [ESA § 9]

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

* * *

(B) take any such species within the United States or the territorial sea of the United States[.]

* * * * *

16 U.S.C. § 1639. Exceptions.
[ESA § 10]

* * *

(j) Experimental populations

(1) For purposes of this subsection, the term "experimental population" means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

(C) For the purposes of this chapter, each member of an experimental population shall be treated as a threatened species; * * *

* * *

(ii) critical habitat shall not be designated under this chapter for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

* * * * *

50 C.F.R. § 424.12 Criteria for designating critical habitat.

Effective: May 1, 2012

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

> Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

* * * * *

50 C.F.R. § 424.19 Final rules—impact analysis of critical habitat.

Effective: May 1, 2012

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the U.S. Fish and Wildlife Service (Service) properly determined that a portion of petitioner's land that was historically occupied by the endangered dusky gopher frog, and that continues to contain valuable habitat for the frog, is eligible to be designated as "critical habitat" under the Endangered Species Act of 1973, 16 U.S.C. 1532(5)(A)(ii).

2. Whether the Service's decision not to exercise its discretionary authority to exclude petitioner's land from critical habitat on grounds of economic impact is committed to agency discretion by law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The opinion of the district court (Pet. App. 78a-122a) is reported at 40 F. Supp. 3d 744.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2016. A petition for rehearing was denied on February 13, 2017 (Pet. App. 123a-162a). On March 27, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 29, 2017. On June 9, 2017, Justice Thomas further extended the time to and including July 13, 2017. The petition for a writ of certiorari was filed on July 11, 2017, and granted on January 22, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1a-23a.

STATEMENT

1. a. Congress enacted the Endangered Species Act of 1973 (Act), 16 U.S.C. 1531 *et seq.*, to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. 1531(b). Responsibility for administering the Act is shared by the Secretary of the Interior and the Secretary of Commerce. 16 U.S.C. 1532(15). The U.S. Fish and Wildlife Service (Service) implements the Act with respect to species under the jurisdiction of the Secretary of the Interior. 50 C.F.R. 402.01(b).

Section 4 of the Act directs the Service to identify species that are "endangered" or "threatened" and to list them by regulation published in the Federal Register. 16 U.S.C. 1533(a)(1)-(2) and (c)(1); see 50 C.F.R. 17.11-17.12.[1] When the Service lists a species as endangered or threatened, Section 4 also requires the Service, "to the maximum extent prudent and determinable," to issue a regulation that "designate[s] any habitat of such species which is then considered to be critical habitat." 16 U.S.C. 1533(a)(3)(A)(i); see 50 C.F.R. 17.95-17.96.

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[1] An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6). A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20).

Section 3 of the Act defines a species' "critical habitat" to include two kinds of areas: occupied and unoccupied. Occupied critical habitat consists of "the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). Unoccupied critical habitat consists of "specific areas outside the geographical area occupied by the species at the time it is listed" if the Service "determin[es] * * * that such areas are essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii). At all times relevant here, the Service's regulations allowed it to designate unoccupied critical habitat "only when a designation limited to [the species'] present range would be inadequate to ensure the conservation of the species." 50 C.F.R. 424.12(e) (2012).[2]

As noted, both occupied and unoccupied critical habitat are defined in reference to what is "essential" for "conservation" of the species. 16 U.S.C. 1532(5)(A)(i)-(ii). The Act defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. 1532(3).

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[2] In 2016, the Service amended its regulations governing designation of critical habitat. 81 Fed. Reg. 7414 (Feb. 11, 2016). The Service has since agreed to reconsider those amendments as part of a litigation settlement. See *Alabama* v. *National Marine Fisheries Serv.*, 16-cv-593 Docket entry No. 55 (S.D. Ala. Mar. 15, 2018). Because the critical-habitat designation at issue here was governed by pre-2016 regulations, neither the 2016 amendments nor their pending reconsideration has any direct bearing on this case.

Such conservation measures include "all activities associated with scientific resources management," such as "habitat acquisition and maintenance, propagation, live trapping, and transplantation." *Ibid.*

Because "conservation" includes the goal of achieving a species' recovery—the point at which it is "no longer necessary" to list the species as endangered or threatened, 16 U.S.C. 1532(3)—"'[c]onservation' is a much broader concept than mere survival." *Sierra Club* v. *U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441-442 (5th Cir. 2001). Accordingly, areas that are "essential to the conservation of the species," and therefore properly designated as critical habitat, may include "not only [areas] necessary for the species' survival but also [areas] essential for the species' recovery." *Gifford Pinchot Task Force* v. *United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (citation omitted); see also, *e.g.*, *Center for Native Ecosystems* v. *Cables*, 509 F.3d 1310, 1322 (10th Cir. 2007) ("[C]onservation encompasses recovery."); J.A. 128 ("[Conservation] is a broader standard than simply survival.").

Section 4 of the Act requires that, in designating critical habitat, the Service must rely on the "best scientific data available" and "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). It also provides that the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," so long as "the failure to designate such area as critical habitat will [not] result in the extinction of the species concerned." *Ibid.* The Act otherwise

does not specify whether or when the Service should exercise its discretionary exclusion authority.

b. The listing of a species as endangered, and the designation of its critical habitat in turn, give rise to distinct legal consequences.

The Act establishes numerous protections applicable to the endangered species itself. For example, Section 9 of the Act generally makes it unlawful to "take" an endangered species, 16 U.S.C. 1538(a)(1)(B)-(C), meaning to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [the species], or to attempt to engage in any such conduct," 16 U.S.C. 1532(19). Such unlawful "tak[ing]" includes "habitat modification that results in actual injury or death to members of an endangered or threatened species." *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 697 (1995). The Act also forbids the import, export, possession, transportation, or sale of endangered species. 16 U.S.C. 1538(a)(1)(A) and (D)-(F). Those prohibitions, applicable to both private and governmental actors, are enforceable through criminal and civil penalties. 16 U.S.C. 1540(a)-(b).

By contrast, the designation of a species' critical habitat "does not impose a legally binding duty on private parties." J.A. 119. Instead, Section 7 of the Act requires "[e]ach Federal agency" to, "in consultation with and with the assistance of the [Service], insure that any action authorized, funded, or carried out by such agency * * * is not likely" either to "jeopardize the continued existence" of the listed species, 16 U.S.C. 1536(a)(2), or to "result in the destruction or adverse modification of habitat of such species which is determined by the [Service] * * * to be critical," *ibid.* If this consultation process demonstrates that a proposed agency action is likely to jeopardize a species or destroy or adversely modify its

critical habitat, the Service is required to issue a biological opinion that "suggest[s] * * * reasonable and prudent alternatives" to the proposed action, if available. 16 U.S.C. 1536(b)(3)(A); see 50 C.F.R. 402.02 (defining such alternatives). The federal agency may then choose either to "terminate the [proposed] action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 652 (2007); see 50 C.F.R. 402.15. This Section 7 consultation process is only required, however, if the proposed action involves "'discretionary Federal involvement or control'" rather than implementation of a "mandatory agency directive[]." 551 U.S. at 666 (quoting 50 C.F.R. 402.03).

Because Section 7 is triggered only when an independent federal nexus exists, the designation of private land as critical habitat "[i]n many cases * * * may have little or no impact on activities within the area of the habitat." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 10 (1978) (*1978 House Report*). Such a designation "does not allow the government or public to access private lands"; "does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners"; and does not "affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area." J.A. 140; see J.A. 119-120; Pet. App. 2a. Thus, although the designation may ultimately have consequences for the use or value of private land, such land is affected only if a project requires discretionary action by a federal agency.

2. a. The dusky gopher frog (*Rana sevosa*) was listed as an endangered species in 2001. 66 Fed. Reg. 62,993.[3] The frog breeds in isolated ephemeral ponds—

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[3] The frog was then known as the "Mississippi gopher frog." 66 Fed. Reg. at 62,993.

ponds not connected to other water bodies and that exist only seasonally—and then spends most of its adult life in tree stumps, holes, or burrows created by other species. *Id.* at 62,994. Thus, the frog's "habitat includes both upland sandy habitats historically forested with longleaf pine and isolated temporary wetland breeding sites embedded within the forested landscape." *Ibid.*; see J.A. 56-57 (photographs of frog and habitat).

The dusky gopher frog is "one of the most imperiled species (or sub-species) in the United States." J.A. 45. According to historical records, the frog at one time lived throughout parts of Alabama, Louisiana, and Mississippi. 66 Fed. Reg. at 62,994; see J.A. 58 (historical range). By 2001, however, the Service knew of only one population surviving in the wild: approximately 100 adult frogs at a single pond (Glen's Pond) in Harrison County, Mississippi. 66 Fed. Reg. at 62,995; see J.A. 56 (photograph of Glen's Pond). The "primary factor" in the frog's decline was "urbanization and conversion of forest to pine plantation." 66 Fed. Reg. at 62,994-62,995. The Service found that the species' continued existence was endangered by its small population and the fragmentation and destruction of its habitat. *Id.* at 62,997-63,000.

Since 2001, naturally occurring dusky gopher frogs have been seen at two other sites in an adjacent county (Jackson County, Mississippi), and another population was established there through translocation. U.S. Fish & Wildlife Serv., *Dusky Gopher Frog* (Rana sevosa) *Recovery Plan* 6-7 (2015), http://perma.cc/C9TQ-DJZU (*Recovery Plan*). Nonetheless, as of 2015, only an estimated "minimum of 135 individual adult frogs survive in the wild." *Id.* at iv. Almost all are at Glen's Pond, which is "the only population that is considered stable." *Id.* at 7.

Accordingly, "the dusky gopher frog remains critically endangered." U.S. Fish & Wildlife Serv., *Dusky Gopher Frog* (Rana sevosa) *Five-Year Review: Summary and Evaluation* 3 (2015), http://perma.cc/24DJ-KQHP. "The establishment of additional populations" of the frog remains "critical to protect the species from extinction and provide for the species' eventual recovery." J.A. 115.

b. When the Service listed the frog as endangered in 2001, it did not have resources available to immediately designate the frog's critical habitat. 66 Fed. Reg. at 63,000. In 2007, respondent Center for Biological Diversity sued the Service challenging its failure to designate critical habitat. That suit ended in a court-approved settlement. J.A. 103.

The Service published an initial proposed designation in 2010, which included both occupied and unoccupied critical habitat. 75 Fed. Reg. 31,387. To determine the frog's "occupied" critical habitat, the Service identified the "physical or biological features" that were "essential to the conservation of the species" and that "may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). The Service's proposed rule identified three "primary constituent elements" (PCEs) that it found "essential" for the frog's conservation. 75 Fed. Reg. at 31,391; cf. 50 C.F.R. 424.12(b) (2012). These "PCEs" were: (1) isolated, ephemeral ponds in which the frog may breed, with specified canopy, vegetation, water-quality, and land-management characteristics; (2) "[u]pland forested nonbreeding habitat," also with various specified characteristics; and (3) "upland connectivity habitat between breeding and nonbreeding habitats." 75 Fed. Reg. at 31,393, 31,404.

The Service found that the four Mississippi sites occupied by the frog contained those features, and it proposed to designate each as critical habitat. *Id.* at 31,395.

The Service also proposed to designate seven areas in Mississippi as unoccupied critical habitat. The Service noted that the few sites occupied by the frog were "highly localized and fragmented," leaving them "highly susceptible to random events" such as drought and disease. 75 Fed. Reg. at 31,394. The Service thus concluded that maintaining "suitable habitat" in the unoccupied areas was "essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery." *Id.* at 31,397.

The Service obtained peer review of its proposal by six specialists with expertise concerning the frog and related species, the region's geography and ecology, and conservation-biology principles. J.A. 105-108. The reviewers were "united in their assessment" that the Service's proposed critical-habitat designation was "inadequate for the conservation of the dusky gopher frog." J.A. 124. The reviewers emphasized that the frog would be at greater "risk of extirpation" from localized threats such as "drought or disease" if critical habitat was limited to "southern Mississippi." J.A. 13-14. The reviewers therefore urged the Service to "look within the species' historic range outside the state of Mississippi for additional habitat for the designation." J.A. 124.

The Service then undertook to identify additional habitat within the species' historical range. As noted, although the frog lives most of its adult life belowground in forested uplands, its breeding site is "an isolated pond * * * that dries completely on a cyclic basis." 66 Fed. Reg. at 62,994. Such a pond must retain water long

enough to "allow hatching, development, and metamorphosis" of the frog, but not so long as to support fish that prey on the frog's eggs or larvae. *Ibid.*; see J.A. 122. Given the "importance [of such ponds] to survival of the species," and the "rarity of open-canopied, isolated, ephemeral ponds" within the frog's historical range, the Service focused its efforts specifically on breeding habitat. J.A. 124; see J.A. 158.

One of the peer reviewers, Dr. Joseph Pechmann, called the Service's attention to a site in St. Tammany Parish, Louisiana. J.A. 14. This site, later designated "Unit 1," was the last known site inhabited by dusky gopher frogs outside of Mississippi; the frog was last seen there in 1965. J.A. 167. Unit 1 includes five isolated ephemeral ponds and associated uplands on private property managed for timber operations. J.A. 166-167. Dr. Pechmann advised that Unit 1 "contains the best remaining collections of breeding ponds for gopher frogs in Louisiana and some of the best ponds available anywhere in the historic range of the frog." Administrative Record (A.R.) 2408. He further observed that, although the surrounding "terrestrial habitat" was "currently in commercial pine plantations," the habitat "retain[ed] some stump holes" in which adult frogs could live and "could be restored" into optimal terrestrial habitat. J.A. 14. With petitioner's consent, the Service conducted a field visit to Unit 1. See J.A. 17-20 (photographs from visit); A.R. 6734-6779 (additional photographs).

3. a. Following a revised proposed designation, additional peer review, public comment, and a public hearing, the Service finalized its designation of critical habitat in 2012. J.A. 99-199 (77 Fed. Reg. 35,118). Its final rule designated 6477 acres of critical habitat, all within the frog's historical range. J.A. 100; see J.A. 165-180. The Service

included 1544 acres of Unit 1, finding the area to be "essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii); see J.A. 166-167.

The Service found that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species." J.A. 126. The Service explained that the five ephemeral ponds not only remained "intact and of remarkable quality," J.A. 160, but were "similar to ponds where dusky gopher frogs currently breed in Mississippi," J.A. 125. Indeed, the Service determined that, "[b]ased on the best scientific information available," the "five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Ibid.*; see J.A. 160 ("[N]o group of five ponds such as these was found" in Mississippi.). The Service further explained that "[i]f dusky gopher frogs are translocated to the site, the five ponds are in close enough proximity to each other that adult frogs could move between them and create a meta-population, which increases the chances of the long-term survival of the population." J.A. 167; cf. *Recovery Plan* 33-34 (discussing "metapopulations"). At the same time, the Service found that Unit 1's distance from other critical habitat "likely provides protection from environmental stochasticity," such as droughts or disease. J.A. 126. The Service therefore concluded that "[m]aintaining the five ponds within this area as suitable habitat" is "essential to decrease the risk of extinction of the species resulting from stochastic events and [to] provide for the species' eventual recovery." J.A. 167; see *Recovery Plan* 4 (similar).

The Service acknowledged that the uplands of Unit 1 were then "poor quality terrestrial habitat" for the frog.

J.A. 160. But it found that the uplands would be "restorable with reasonable effort" to meet the standards deemed essential for the frog's long-term recovery. J.A. 167. Dr. Pechmann's analysis supported this view. J.A. 14, 52-53; A.R. 2408 ("It's much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds.").

The Service also acknowledged that it could not compel Unit 1's owners to allow the frog's return. J.A. 122-123. But it "hope[d] to work with the landowners to develop a strategy that will allow them to achieve their objectives" while also "protect[ing] the isolated, ephemeral ponds that exist there." J.A. 123. The Service noted that federal funds may be available for such efforts. *Ibid.*

b. As required by the Act, see 16 U.S.C. 1533(b)(2), the Service considered the economic impact of its critical-habitat designation. J.A. 184-190. After considering the record, including a detailed economic analysis performed by a consultant, see J.A. 63-98 (excerpts), the Service found "considerable uncertainty" concerning the economic impact upon Unit 1. J.A. 188. The Service noted that the designation would not affect the current use of Unit 1 for timber operations—inasmuch as no federal approvals are required to continue that activity—and it observed that the "timber lease on the[] property does not expire until 2043." J.A. 123.

The Service noted that Unit 1's landowners hoped eventually to undertake residential and commercial development. But the Service found it unclear whether "a Federal nexus for development activities" would ever exist. J.A. 188. The Service observed that Section 7 consultation would be triggered if Unit 1 were determined to contain "jurisdictional wetlands" and if the landown-

ers proposed to discharge fill material into those wetlands. *Ibid.*; see 33 U.S.C. 1344(a). But the Service found it uncertain whether the Clean Water Act, 33 U.S.C. 1251 *et seq.*, would require a discharge permit. J.A. 188-189; see *Solid Waste Agency of N. Cook Cnty.* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 171-172 (2001) ("navigable waters" did not include "isolated ponds, some only seasonal, wholly located within two Illinois counties" based on presence of migratory birds); see also *Rapanos* v. *United States*, 547 U.S. 715, 733-734 (2006) (plurality opinion); cf. *Recovery Plan* 21 (contemplating that "isolated wetlands, such as dusky gopher frog breeding sites," may not fall "under Federal jurisdiction").

Lacking definitive information about the landowners' plans and the jurisdictional status of Unit 1's ponds, the Service posited three hypothetical economic-impact scenarios. J.A. 77. In the first scenario, future uses of Unit 1 would not require any federal permits and thus would not trigger Section 7 consultation, and the critical-habitat designation would therefore "not result in any incremental economic impact." J.A. 68.

In the second and third scenarios, the Service assumed that future development of Unit 1 would both occur and require a Clean Water Act permit. Scenario 2 posited that, after consultation, the landowners would develop 40% of the site and set aside 60% for conservation, which would "provide a meaningful conservation benefit to the gopher frog." J.A. 84. The Service calculated the economic impact in this scenario at $20.4 million. J.A. 91.

Scenario 3 posited that 100% of the site would be required for conservation and that no Clean Water Act permit would issue, with an estimated economic impact of $33.9 million. J.A. 92. The Service found this scenario

unlikely, however, because "virtually all" projects "can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives." J.A. 120. The Service stated that "if the landowners agree to allow the Service to re-introduce the gopher frog in a portion of the unit, the Service anticipates the remainder would be available for development activities." J.A. 84.

The Service then considered whether to exercise its discretionary authority to exclude Unit 1 on the basis that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. 1533(b)(2); see J.A. 189-190. The Service found that the designation would have substantial conservation benefits "in biological terms." J.A. 189. The Service further observed that "[its] economic analysis did not identify any disproportionate costs that are likely to result from the designation." J.A. 190. Accordingly, the Service declined to "exercis[e] [its] discretion to exclude any areas from th[e] designation of critical habitat." *Ibid.*

4. Petitioner Weyerhaeuser Company owns part of Unit 1, leases the remainder, and currently manages the land for commercial timber production. See Pet. Br. 16; Markle Br. 6, 12. Petitioner or its predecessor has leased Unit 1 and its surrounding lands since 1953, and its current lease will expire in 2043. J.A. 80-81 & n.81. Petitioner has also reached an understanding with other landowners to develop the property "when market conditions are amenable." J.A. 80; cf. J.A. 81 n.81 (reporting landowner statement that such development "would not occur until 2043").

In 2013, petitioner and other landowners, including respondents Markle Interests, LLC *et al.* (collectively plaintiffs), brought suit in the Eastern District of Louisiana challenging the Service's designation of Unit 1 as

unoccupied critical habitat. Plaintiffs asserted, *inter alia*, that the Service's actions violated the Endangered Species Act and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and exceeded Congress's authority under the Commerce Clause. The district court consolidated the suits and allowed respondents Center for Biological Diversity and Gulf Restoration Network to intervene as defendants.

The district court entered summary judgment for the Service. Pet. App. 78a-122a. The court held that the Service's determination of critical habitat was consistent with the Act and that its finding that Unit 1 was essential for the frog's conservation was adequately supported by the administrative record. *Id.* at 102a-110a. The court also concluded that because "[t]he record confirm[ed] that [the Service] considered potential economic impacts" and "costs associated with Section 7 consultation," the Act did not allow it to second-guess the agency's judgment that the "impacts to Unit 1 were not disproportionate." *Id.* at 117a-118a.

5. a. The court of appeals affirmed. Pet. App. 1a-77a.

The court of appeals concluded that the Service's designation of Unit 1 as unoccupied critical habitat was consistent with the Act and supported by the administrative record. Pet. App. 15a-32a. The court noted that plaintiffs had not challenged the Service's finding that a designation limited to the frog's occupied habitat would be inadequate, *id.* at 17a, nor had they "dispute[d] the scientific or factual support for the Service's determination[s]" concerning the value of Unit 1, *id.* at 20a-21a. The court concluded that the Service's interpretation of the term "essential" was reasonable and "entitled to *Chevron* deference," *id.* at 22a, and it upheld the Ser-

vice's designation after finding that "*in this case*, substantial, consensus, scientific evidence in the record supports the Service's conclusion" that Unit 1 was essential for the frog's conservation, *id.* at 30a n.20. In particular, the court emphasized that Unit 1 contains isolated ephemeral ponds that are rare, critical to the frog's survival, and difficult to reproduce elsewhere. *Id.* at 29a.

The court of appeals also rejected plaintiffs' argument that the Service erred by declining to exclude Unit 1 from the critical-habitat designation on economic-impact grounds. Pet. App. 32a-36a. The court concluded that that claim was unreviewable because the Act sets forth "no manageable standards for reviewing the Service's decision not to exercise [that] discretionary authority." *Id.* at 34a.

Judge Owen dissented. Pet. App. 48a-77a. She expressed the view that Unit 1 was not "essential for the conservation" of the frog because the area currently "plays no part in the conservation of that species," *id.* at 48a, and there was "no reasonable probability that it could actually be used for conservation" in light of plaintiffs' opposition, *id.* at 61a; see *id.* at 49a-50a, 59a-63a.

b. Plaintiffs sought rehearing en banc, which was denied. Pet. App. 123a-162a. Judge Jones, joined by five judges, dissented from the denial. *Id.* at 124a-162a. Based on her assumption that Unit 1 is "uninhabitable" by the dusky gopher frog, *id.* at 128a, Judge Jones opined that Unit 1 was categorically ineligible to be designated as critical habitat. Judge Jones also disagreed with the panel's conclusion that the Service's decision not to exclude Unit 1 was committed to the agency's discretion. *Id.* at 156a-162a.

SUMMARY OF ARGUMENT

I. The Service properly determined that Unit 1 both contains "habitat" and is "essential for the conservation" of the dusky gopher frog.

A. Petitioner's argument that Unit 1 is not "habitat" rests on flawed factual and legal premises. The record shows that the Service found that Unit 1 constitutes "habitat" for the frog: it contains the isolated ephemeral ponds needed for the frog's breeding, as well as terrestrial habitat that could be inhabited by adult frogs.

Petitioner's contrary assumption demonstrates its mistaken conflation of statutory concepts. Although the Service found that Unit 1 does not yet contain all of the biological and physical features associated with occupied "critical habitat," the absence of those features does not mean that Unit 1 does not qualify as "habitat." Rather, it simply means that reasonable restoration would be needed, consistent with the Act's understanding that "conservation" may require habitat improvements to promote a species' recovery. Moreover, the Service's finding that Unit 1 contains "habitat" accords with the Service's longstanding, common-sense interpretation, which reflects the best understanding of the statutory term and, at the very least, merits deference.

B. The Service also properly determined that Unit 1 is an "area" unoccupied by the frog that is "essential for [its] conservation." 16 U.S.C. 1532(5)(A)(ii). The Service found that Unit 1 not only contains the frog's rare breeding habitat, but the best such habitat within the frog's entire historical range. Unit 1 would also provide protection from extinction in the event that the few remaining populations, clustered in two Mississippi counties, were extirpated through drought, disease, or an-

other localized event. Moreover, Unit 1 could be restored with "reasonable effort," distinguishing it from other historically occupied sites where such restoration is not readily feasible.

II. The Service's decision not to exercise its discretionary authority to exclude Unit 1 from critical habitat on economic-impact grounds is unreviewable under 5 U.S.C. 701(a)(2) because it is committed to agency discretion by law. The first sentence of Section 4(b)(2), mandating that the Service "tak[e] into consideration" the "economic impact" of a designation, establishes a judicially enforceable requirement. 16 U.S.C. 1533(b)(2). By contrast, the second sentence provides only that the Service "may" exclude an area from critical habitat if it finds the benefits of exclusion outweigh those of inclusion. *Ibid.* And although the statute specifies that the Service *may not* exclude an area from critical habitat if it would lead to the species' extinction, it does not provide standards for determining when the Service *should* or *must* exclude it. The statute thus provides no meaningful standard against which to judge the agency's exercise of discretion.

ARGUMENT

I. THE SERVICE PROPERLY DESIGNATED UNIT 1 AS UNOCCUPIED CRITICAL HABITAT

The Service's designation of Unit 1 as unoccupied critical habitat must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). There is no basis to set aside the Service's designation under that standard.

A. Unit 1 Contains "Habitat" For The Dusky Gopher Frog

In the court of appeals, petitioner argued that Unit 1 could not be unoccupied critical habitat on the theory that it is not "essential for the conservation of the species" under the definition in Section 3(5)(A)(ii) of the Act, 16 U.S.C. 1532(5)(A)(ii). See Pet. C.A. Br. 19-21, 27-41. In this Court, however, petitioner now argues (Pet. Br. 19, 22-23; see Markle Br. 26-27) that the designation is inconsistent with Section 4(a)(3)(A)(i), which directs the Service to "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. 1533(a)(3)(A)(i). Observing that the Act contemplates that a species' "critical habitat" is part of its "habitat," petitioner argues that Unit 1 cannot be critical habitat "as a matter of law" because, it asserts, Unit 1 is not "habitat" in the first instance. Pet. Br. 19. That assertion rests on mistaken premises about the factual record and the meanings of "habitat" and "critical habitat" under the Act.

1. The Service found that Unit 1 contains "habitat" for the dusky gopher frog

The Service's final designation of Unit 1 found it to contain "habitat" for the dusky gopher frog.

a. As noted, see pp. 9-10, *supra*, Unit 1 was identified after peer reviewers criticized the initial proposed designation as inadequate. The Service then "look[ed] within the species' historic range outside the state of Mississippi for additional habitat for the designation." J.A. 124. One reviewer, Dr. Pechmann, alerted the Service to "[t]he pond where *Rana sevosa* was last documented in Louisiana" and "[a]nother pond located nearby." J.A. 14. Dr. Pechmann noted that these ponds "retain[ed] the required characteristics necessary to serve as a breeding pond." *Ibid.* And with respect to the frog's "terrestrial

habitat," Dr. Pechmann advised that the upland area "retains some stump holes" in which frogs could live and observed that the uplands "could be restored" to meet the Service's conservation standards. *Ibid.*

The Service performed a "habitat assessment" of Unit 1. J.A. 160; cf. J.A. 123 ("During the process of delineating critical habitat, the Service assesses habitat to determine if it is essential for the conservation of a listed species."). The Service concluded that the five ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." J.A. 125. The isolated, ephemeral ponds were "intact and of remarkable quality," J.A. 160, and "similar in appearance (water clarity, depth, vegetation) to ponds in Mississippi used for breeding," *ibid.*

The Service also found that Unit 1 contained "terrestrial habitat" in which adult frogs could live. J.A. 160. Field notes of one Service official reflected observations of various "[s]tumps" in the "uplands" surrounding the ephemeral ponds, some which were "[one] foot to 10 in[ches]" and "others smaller," as well as "stumps / root mounds surrounding th[e] pond basin" at "Dry Pond." A.R. 3080. Dr. Pechmann's notes similarly reflected "lots of stumps" near various ponds and a "good gopher frog hole" near Dry Pond. A.R. 3099-3100; see J.A. 18; A.R. 6744.

The Service noted that this "terrestrial habitat" was of "poor quality," J.A. 160; see A.R. 3080 ("would prob. need to create more frog refugia"), but concluded that those uplands were "restorable with reasonable effort," J.A. 167. Such restoration would "*improve* [the] *habitat* for the dusky gopher frog" at Unit 1 so as to attain stand-

ards for the frog's long-term conservation. J.A. 123 (emphasis added); see J.A. 167 (noting that "the uplands associated with the ponds do not currently contain the essential physical or biological features of *critical* habitat") (emphasis added). And as Dr. Pechmann noted, even without improvements, Unit 1 already "contain[ed] the *best gopher frog habitat* remaining in Louisiana, to [his] knowledge." J.A. 53 (emphasis added).

In finding Unit 1 to be habitat, the Service also observed that the frog had previously inhabited the area. Unit 1 contained "at least two historic breeding ponds for the dusky gopher frog," J.A. 124, and the last sighting of the frog anywhere outside Mississippi had occurred at Unit 1, J.A. 167. And Unit 1's ponds—unlike other wetlands throughout the frog's historical range—today remain "intact and of remarkable quality." J.A. 160.

The Service's designation of Unit 1 as unoccupied critical habitat thus subsumed a determination that Unit 1 contained, albeit with varying degrees of quality, the basic elements of "habitat" required during the dusky gopher frog's life cycle. Indeed, petitioner and Markle did not contend otherwise in their comments during the rulemaking process, see A.R. 1825-1839, 1692-1711; p. 25 n.5, *infra*, and they disclaimed any attempt to "challenge any of the[] [Service's] premises as a factual matter" on judicial review, Pet. C.A. Br. 36.

b. Petitioner asserts that "[i]f dusky gopher frogs were moved to Unit 1, they would not survive." Pet. Br. 25; see *id.* at 19, 35, 43 (similar). But petitioner does not dispute any of the facts just described. Petitioner does not contend, for example, that Unit 1 lacks isolated ephemeral ponds in which the frog could breed or forests with stump holes in which adult frogs could live. Rather, petitioner's assertion rests solely on a presumed absence

of any "[]dispute[]" that "the frog cannot live in Unit 1." *Id.* at 19.

Petitioner's assertion is mistaken. It is true that the Service found that "the uplands associated with the ponds" at Unit 1 do not "currently contain the *essential physical or biological features* of *critical* habitat." J.A. 167 (emphasis added). But that finding does not mean that the dusky gopher frog "would immediately die if moved" to Unit 1. Pet. Br. 28. Rather, it simply means that the upland habitat is of relatively poor quality and would require some restoration as part of long-term conservation efforts.[4]

2. Under the Act, an area may be "habitat" even if it does not satisfy the standards for "occupied" "critical habitat"

What the Service's findings illustrate—and what petitioner's argument erroneously elides—is the distinction under the Act between "habitat" and "occupied" "critical habitat."

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[4] Petitioner's assertion that "[i]t is undisputed" that "the frog cannot live in Unit 1" (Pet. Br. 19; see also *id.* at 24-25) mischaracterizes the government's position. The government has consistently argued that Unit 1 contains habitat for the frog. See, *e.g.*, Gov't Br. in Opp. 23 (observing that "the Service never concluded that Unit 1 is not 'habitat' or is 'uninhabitable' by the frog," and noting that petitioner was "mistaken[]" in "declaring it 'undisputed' that Unit 1 is not 'habitat'") (citation omitted); Gov't C.A. Br. 29, 32 (explaining that "the Service found that the uniquely valuable ephemeral ponds found on Unit 1 constituted habitat that is essential to the conservation of the frog," and disputing assertion that "Unit 1 is 'unsuitable' as habitat"); D. Ct. Doc. 91-1, at 1 & n.1, 15 (Feb. 21, 2014) (arguing that petitioner's suggestion that "Unit 1 is 'not actually habitat at all'" was "baseless," because Unit 1 contains both "the best frog breeding habitat, in its totality, in the species' range" and "underground refugia that would allow for survival") (citation omitted).

Section 4 of the Act directs the Service, "to the maximum extent prudent and determinable," to promulgate a regulation that "designate[s] *any habitat* of such species which is then considered to be *critical habitat*." 16 U.S.C. 1533(a)(3)(A)(i) (emphasis added). The Act thereby contemplates that a species' "critical habitat" is part of its "habitat." But Section 4 provides no further guidance as to what areas of "habitat" are of sufficient value or importance to the species that they are "considered to be critical."

That guidance is instead provided in Section 3 of the Act, which defines "critical habitat." Section 3(5)(A)(i) provides that a species' "occupied" habitat is "critical" if it contains "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). At relevant times, the Service's regulations described this set of features in terms of the "[p]rimary constituent elements" (PCEs) of critical habitat. 50 C.F.R. 424.12(b) (2012). These are elements that the Service has found essential to achieving a species' "conservation," including its ultimate recovery. See *ibid.*

The PCEs do not, however, define requirements for "habitat" itself. The statutory text on which the PCEs are based—"physical or biological features * * * essential to the conservation of the species"—appears in the Act's definition of "occupied" "critical habitat," not in any definition of "habitat." As petitioner acknowledges, "'critical habitat' [is] a *subset* of 'habitat of such species,'" Pet. Br. 3 (emphasis added), and "Congress envisioned critical habitat to be *at most coextensive with*, and almost always narrower than, all habitable areas," *id.* at 26. Indeed, the Act provides that occupied critical habitat con-

sists of "*specific areas within* the geographical area occupied by the species" that possess the requisite biological and physical features. 16 U.S.C. 1532(5)(A)(i) (emphasis added); see also 16 U.S.C. 1532(5)(C). If, however, a species' "habitat" were itself required to contain all of the same biological and physical features necessary to constitute occupied critical habitat, a species' "habitat" would automatically qualify as "critical habitat" so long as it was occupied. The definition of occupied "critical habitat" would then be redundant with occupied "habitat," in contravention of basic principles of statutory interpretation. See *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018).

The Service's final designation in this case reflects the understanding that the PCEs are criteria of occupied critical habitat that are directed at conservation of the entire species, not minimal requirements for "habitat" for members of the species. As petitioner notes, PCE 2 contemplates that the uplands would be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." Pet. Br. 2; see *id.* at 12, 25, 27. But the Service identified such "frequent fires" as a feature of "[o]*ptimal* habitat," not of "habitat" itself. J.A. 145 (emphasis added); see also *Recovery Plan* iv (defining "[o]*ptimal* post-larval dusky gopher frog habitat" as "uplands dominated by *fire-maintained* longleaf pine") (emphasis added).

3. The Service's understanding that Unit 1 is "habitat" reflects the best reading of the statute and, at a minimum, warrants deference

Because the arguments petitioner now makes concerning the meaning of "habitat" were not presented to the Service during the rulemaking, the Service's final

designation did not have occasion to address them.[5] Nonetheless, the conclusion that Unit 1 contains "habitat" accords with both common sense and the Service's longstanding interpretation. Petitioner's contrary arguments are without merit.

a. Section 4 of the Act generally directs the Service to "designate *any habitat* of such species which is then considered to be *critical habitat*." 16 U.S.C. 1533(a)(3)(A)(i) (emphasis added). Although the Act expressly defines "critical habitat," see 16 U.S.C. 1532(5)(A)(i)-(ii), it does not define "habitat" itself. Instead, Congress left interpretation of that term for the Service in its implementation of the Act.

In lieu of formulating a single, bright-line definition of "habitat" to apply across all of the disparate species and settings to which the Act applies—including not only animals (both vertebrates and invertebrates) but also plants; not only terrestrial species but also aquatic species; not only stationary species but also migratory ones—the Service has developed its understanding of "habitat" through case-by-case application. And through critical-habitat designations for individual species, the

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[5] Plaintiffs focused their comments on the assertion that Unit 1 failed to possess the PCEs, not that it was not "habitat" *simpliciter*. See A.R. 1826 (petitioner's comment letter) (asserting that Unit 1 "is not 'essential' to the conservation of the [dusky gopher frog]" because it "contains none of the primary constituent elements" and will likely "continue to become *less favorable* habitat over the foreseeable future") (emphasis added); A.R. 1833 ("In conclusion, it does not presently appear that [Unit] 1 contains any of the three PCEs to qualify for consideration as *critical* habitat.") (emphasis added); A.R. 1701 (Markle *et al.* comment letter) (asserting that Unit 1 "fails to meet the statutory criteria" because it "contains none of the primary constituent elements" and "is not 'essential' to the conservation of the [dusky gopher frog]").

Service has made clear that a species' "habitat" is not limited to areas that simultaneously provide optimal conditions for every stage of a species' life cycle.

First, an area may qualify as "habitat" even if it does not contain every single element necessary for a species' survival. For example, a wetland area may serve as "habitat for migratory birds," *Solid Waste Agency of N. Cook Cnty.* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*), even if they spend only part of their lives there. Even species that do not migrate great distances may nonetheless require several distinct "habitat[s]" during their life; many amphibians, for example, require aquatic habitat as juveniles and terrestrial habitat as adults. The Service thus understands the phrase "any habitat" to encompass each of the various habitats required by a species during its life cycle. See, *e.g.*, 82 Fed. Reg. 39,160, 39,218 (2017) (noting distinct "spawning habitat" and "nursery and foraging habitat" of Atlantic sturgeon); 79 Fed. Reg. 69,312, 69,323 (2014) (identifying "seasonally specific PCEs" for Gunnison sage-grouse and noting "few areas would contain all" PCEs); accord J.A. 125 (referring to "breeding habitat" of dusky gopher frog); cf. *Home Builders Ass'n* v. *United States Fish & Wildlife Serv.*, 616 F.3d 983, 988 (9th Cir. 2010) (When "the elements necessary to species survival are present in distinct areas," there is "simply no reason that [all] elements essential for the conservation of a species need be present in the same area."), cert. denied, 562 U.S. 1217 (2011).

Second, an area may be "habitat" even if it is poor quality or "degraded." See 73 Fed. Reg. 61,936, 61,938 (2008) (referring to "degraded habitat" that would "support unsustainable populations" of San Bernardino kangaroo rat, but would "not contribute to [its] recovery"), vacated

on other grounds by *Center for Biological Diversity* v. *United States Fish & Wildlife Serv.*, No. 09-cv-90, 2011 WL 73494 (C.D. Cal. Jan. 8, 2011); 56 Fed. Reg. 40,002, 40,007 (1991) (referring to "poor-quality habitat" for northern spotted owl); accord J.A. 160 (referring to uplands on Unit 1 as "poor quality terrestrial habitat"). Similarly, a species' "habitat" may include "marginal" areas that are not consistently inhabited or that would primarily be useful to help a species recover from a catastrophic event. See, *e.g.*, 73 Fed. Reg. at 61,962 (designating "marginal habitat" as critical habitat for San Bernardino kangaroo rat); 67 Fed. Reg. 40,790, 40,793 (2002) (contrasting "marginal" habitat with "stable aquatic habitats" for Chiricahua leopard frog).

Relatedly, habitat remains "habitat" even if it would require human intervention (such as restoration) to become optimal for a species' long-term conservation. See 78 Fed. Reg. 8746, 8758 (2013) (designating, as unoccupied critical habitat for tidewater goby, habitat areas in which "some form of restoration will be necessary"); J.A. 154 (noting that even "occupied" areas may require management to "maintain or restore the PCEs"); cf. Pet. App. 108a n.28 (agreeing that "it does not make sense" to limit designations of critical habitat to "only those areas that contain optimal conditions for the species").

Third, in appropriate circumstances, a species' "habitat" may include not only the area where a species is found, but also parts of the surrounding area that provide elements necessary to maintain the species. See, *e.g.*, *Bear Valley Mut. Water Co.* v. *Jewell*, 790 F.3d 977, 993-994 (9th Cir. 2015) (upholding designation of sub-unit of critical habitat for Santa Ana sucker that provides coarse sediment for spawning elsewhere in unit), cert. denied, 136 S. Ct. 799 (2016); cf. Pet. C.A. Br. 29-30 (agreeing

that the Service "rationally explain[ed]" in *Bear Valley* why that sub-unit "was essential"); see also 81 Fed. Reg. 59,046, 59,064 (2016) (designating adjacent upland areas that provide necessary water quality for yellow-legged frog); 78 Fed. Reg. 10,450, 10,458 (2013) (designating upstream areas that provide necessary sediment for Coachella valley milkvetch).

b. The Service's interpretation of "habitat" reflects the best reading of the Act. In construing statutory text, this Court "look[s] to both 'the language itself [and] the specific context in which that language is used.'" *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (second set of brackets in original). Here, "habitat" must be interpreted in light of the closely related term "critical habitat." Critical habitat is a subset of habitat and is statutorily defined to include both "areas *within* the geographical area occupied by the species" and "areas *outside* the geographical area occupied by the species." 16 U.S.C. 1532(5)(A)(i)-(ii) (emphasis added). The Act further identifies those subsets of critical habitat by reference either to "physical or biological features" (for occupied critical habitat), or to "areas" (for unoccupied critical habitat), which are found to be "essential" for "conservation of the species." *Ibid.* Given those definitions, the conclusion readily follows that an "area" may qualify as "habitat" even if it is "outside the geographical area occupied by the species," and even if it does not currently contain the "physical or biological features" of *occupied* critical habitat. See pp. 23-24, *supra*.

Moreover, Section 4 of the Act makes "*any* habitat" of the species eligible to be considered as critical habitat. 16 U.S.C. 1533(a)(3)(A)(i) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is,

'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). The phrase "any habitat" thus supports the conclusion that a species may have multiple types of "habitat," and an area may constitute "habitat" even if it does not meet all of the species' needs across its entire life cycle.

That a species may require multiple "habitat[s]" or types of "habitat" also accords with common usage. For example, this Court and other courts have frequently used the term "habitat" to describe areas that a species uses only seasonally or for one purpose, even though it does not contain every feature necessary for a species' existence. See, *e.g.*, *Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1955 (2017) (Roberts, C.J., dissenting) ("nesting habitat" for turtles); *SWANCC*, 531 U.S. at 172 ("habitat for migratory birds"); *Marsh* v. *Oregon Nat. Res. Council*, 490 U.S. 360, 367 (1989) ("spawning habitat" for fish); *Baldwin* v. *Fish & Game Comm'n*, 436 U.S. 371, 376 (1978) ("winter habitat" for elk); *Oregon Nat. Res. Council* v. *Allen*, 476 F.3d 1031, 1034 n.4 (9th Cir. 2007) ("dispersal habitat" that was "marginal or unsuitable for nesting, roosting or foraging"). Similarly, Congress has used the term "habitat" in other conservation statutes to refer to areas that may not include all elements necessary for survival throughout all life stages. See, *e.g.*, 16 U.S.C. 6602(2), 6603(b)(1)(A) ("nesting habitats" of marine turtles); 16 U.S.C. 3501(a)(1)(B) ("habitats which are essential spawning, nursery, nesting, and feeding areas"); 16 U.S.C. 1440(b)(1)(B) (authorizing Secretary to "enhance degraded habitats").

It is also conventional to use "habitat" to refer to an area that would support one of a species' life functions even if it is no longer naturally accessible. For example,

Congress has authorized the Secretary to "promote access to blocked * * * habitats" for fish spawning. 16 U.S.C. 460ss-1(b)(2)(B)(i). As a result, many salmon now access their spawning habitat using fish ladders, and juveniles may then be transported downstream on barges or trucks. See, *e.g.*, *Wild Fish Conservancy* v. *Salazar*, 628 F.3d 513, 520 (9th Cir. 2010). These usages show that the term "habitat" is not inherently confined to areas "accessible to the species" without any human intervention. Markle Br. 27.

In addition, the Service's understanding that even poor-quality habitat is nonetheless "habitat" is supported by the Act's definition of "conservation." Conservation includes "the use of all methods and procedures" calculated to achieve a species' recovery from endangered or threatened status, including but not limited to "activities associated with scientific resources management" such as "habitat * * * maintenance" and "transplantation." 16 U.S.C. 1532(3). If an area had to contain optimal conditions before it could even qualify as "habitat," the Act's contemplation that habitat may need restoration for recovery of the species would have little meaning.

Finally, the Service's interpretation of "habitat" is consistent with the Act's expressly stated purposes. Congress intended the Act to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. 1531(b).[6] Congress considered the "destruction of criti-

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[6] This Court has looked to the Act's stated purposes and supporting legislative record in interpreting other provisions. See, *e.g.*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*,

cal habitat" to be the "most significant" threat to conservation of species, H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973) (*1973 House Report*), and the "intent and purpose" of the Act was to ensure the government's ability to protect areas needed for conservation, *ibid.*; see also *1978 House Report* 5. Those purposes are furthered by an interpretation of "habitat" that accounts for varying kinds of habitat and degrees of habitat quality and the common-sense proposition that a species may be endangered or threatened precisely because of an absence of optimal habitat. See 16 U.S.C. 1533(a)(1)(A) (identifying "present or threatened destruction, modification, or curtailment of its habitat" as a "factor[]" justifying listing a species).

c. At a minimum, the Service's interpretation of "habitat" is reasonable and entitled to deference. "When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary." *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 708 (1995) (*Sweet Home*). As this Court has recognized, the protection of endangered and threatened species "requires an expertise and attention to detail that exceeds the normal province of Congress," *ibid.*, and the proper interpretation of its terms presents "complex policy choice[s]," *ibid.* Accordingly, this Court has recognized that the Service's interpretation of the Act is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), so long as it "rests on a permissible construction of the

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515 U.S. 687, 698-699 (1995) (upholding interpretation of "take" as including habitat modification because it furthered Act's "central purposes"); *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 174 (1978) (legislative record "indicate[d] beyond doubt that Congress intended endangered species to be afforded the highest of priorities").

ESA." *Sweet Home*, 515 U.S. at 704. For the reasons discussed above, the Service's understanding of "habitat" is, at a minimum, reasonable and entitled to deference.

d. Petitioner's principal argument to the contrary (Br. 21-29) is that Unit 1 is not "habitable" because it does not currently contain the three PCEs that the Service has identified as essential for "conservation" of the dusky gopher frog. As explained above, however, that argument erroneously conflates the heightened standard for occupied critical habitat—which the Service has defined in terms of PCEs—with the baseline to qualify as habitat.

In support of its unduly narrow interpretation, petitioner also relies upon certain dictionary definitions that define "habitat" in reference to a species' actual or usual occupancy. See, *e.g.*, *American Heritage Dictionary* 586 (2d ed. 1982) ("area or type of environment in which an organism or biological population normally lives or occurs"); *Webster's Third New International Dictionary* 1017 (1976) (*Webster's Third*) ("place where a plant or animal species naturally lives and grows"). But this Court has recognized that "[w]hether a statutory term is unambiguous * * * does not turn solely on dictionary definitions," *Yates* v. *United States*, 135 S. Ct. 1074, 1081 (2015), in part because they fail to account for "the specific context in which that language is used," *id.* at 1082 (quoting *Robinson*, 519 U.S. at 341). Here, the Act expressly provides that an area may form part of a species' "critical habitat" (and therefore necessarily part of its "habitat") even though it is "outside the geographical area occupied by the species." 16 U.S.C. 1532(5)(A)(ii).

In any event, dictionary definitions confirm that "habitat" does not have one single, indisputable meaning. "Habitat" is "[s]ometimes applied to the *geographical*

area over which [a plant or animal] extends, or the special locality to which it is confined," or "to the particular *station* or spot in which a specimen is found." *Oxford English Dictionary* 995 (2d ed. 1989). But other times it "indicate[s] the kind of locality, as the sea-shore, rocky cliffs, chalk hills, or the like." *Ibid.* See also, *e.g.*, *Webster's Third* 1017 ("the kind of site or region with respect to physical features (as soil, weather, elevation) naturally or normally *preferred* by a biological species") (emphasis added); *Random House College Dictionary* 591 (1980) ("1. the native environment of an animal or plant; the kind of place that is natural for the life and growth of an animal or plant."). The latter definitions readily encompass the Service's application of the term "habitat" here.

B. Unit 1 Is "Essential For The Conservation Of The Species"

Petitioner also renews its challenge (Pet. Br. 19-20, 27; see Markle Br. 28-31) to the Service's determination that Unit 1 is "essential for the conservation of" the dusky gopher frog, 16 U.S.C. 1532(5)(A)(ii). That challenge is similarly without merit.

As noted (pp. 2-3, *supra*), the Act establishes distinct standards for occupied and unoccupied critical habitat. "[O]ccupied" critical habitat consists of specific areas that contain "those physical or biological features" that are "essential to the conservation of the species" and "which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). So long as an occupied area contains those features, it may properly be designated as "critical habitat" without regard to other criteria, such as the area's relative importance within overall conservation efforts.

Unoccupied critical habitat is defined differently. Instead of depending upon the presence of features on lands

that may otherwise be fungible, unoccupied critical habitat includes only "areas" that themselves are found to be "essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii). The Service's determination that a particular area meets that standard is of course informed by its particular characteristics, such as the presence of rare and valuable elements like the ephemeral ponds on Unit 1. But the test for unoccupied critical habitat ultimately requires an assessment that the area itself is "essential" for the overall conservation of the species.

1. The Service properly determined that Unit 1 is essential for the dusky gopher frog's recovery

The Service's findings about Unit 1 and the conservation needs of the dusky gopher frog, taken together, amply support the Service's determination that Unit 1 is "essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii).

a. First, the Service found—and petitioner does not contest—that a critical-habitat designation limited to the frog's current range would be "inadequate for [its] conservation." J.A. 124; see 50 C.F.R. 424.12(e) (2012) (requiring this threshold finding). When the frog was listed as endangered in 2001, its extant population was "only 100 adult frogs at a single site." 66 Fed. Reg. at 62,995. That site—Glen's Pond—continues to contain the only "stable" frog population. *Recovery Plan* 7. Even there, the frog remains vulnerable to potential extirpation by localized disasters, droughts, or disease, such as "newly discovered fungi that have been devastating to juvenile amphibians." J.A. 46; see J.A. 157 (explaining that "population sizes are extremely small and at risk of extirpation and extinction from stochastic events'"). For this reason, peer reviewers advised that "[p]otential *R. sevosa*

translocation sites must be spread out over as wide a geographic area as possible." J.A. 13. The Service found that designating Unit 1 as critical habitat would protect against those risks. As petitioner itself notes, "Unit 1 is 50 miles from where the frog [currently] lives." Pet. Br. 14. If sites in Mississippi were "negatively affected by environmental threats or catastrophic events," Unit 1 would provide "a refuge for the frog." J.A. 125-126.

Second, Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species." J.A. 126. Of the various habitats required for the frog's survival and recovery, none is more rare or "difficult to establish" than its breeding habitat. J.A. 122; see J.A. 125 (identifying absence of breeding habitat as "a limiting factor in dusky gopher frog recovery"). Yet Unit 1 not only retains isolated ephemeral ponds that could serve (and previously served) as breeding sites; the ponds also "are in close proximity to each other." J.A. 125. The ponds thus could support a "metapopulation structure," *i.e.*, "neighboring local populations close enough to one another that dispersing individuals could be exchanged (gene flow) at least once per generation." J.A. 147-148. Such interbreeding promotes "[g]enetic variation and diversity," which is "essential for recovery, adaptation to environmental changes, and long-term viability." J.A. 148; see *Recovery Plan* 33-34 (identifying establishment of "metapopulation in * * * *Louisiana*" as precondition for "downlisting" from endangered status).

Third, the Service found that Unit 1 was unique within the frog's historical range. Upon reviewing the "best scientific information available," the Service found that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the

historic range of the dusky gopher frog." J.A. 125; see J.A. 160 (ponds were unmatched "in any of the areas of historical occurrence that [the Service] searched in Mississippi"); J.A. 53 (opinion of Dr. Pechmann).

Finally, the Service found that, although Unit 1 did not currently meet all three PCEs, it could attain them "with reasonable effort." J.A. 167.[7] That distinguished Unit 1 from other, historically occupied sites where restoration would not be readily feasible. See, *e.g.*, J.A. 127 (noting that "[t]he upland terrestrial habitat" at the last occupied site in Alabama "has been destroyed and replaced by a residential development"). And the Service noted that, although conservation efforts at Unit 1 would require cooperation by present or future landowners, various programs and funding sources may aid in securing that cooperation. J.A. 125.

That constellation of findings readily satisfies the "essential for * * * conservation" standard under any reasonable interpretation. Unit 1 was previously occupied by the dusky gopher frog and continues to contain the best remaining breeding habitat anywhere within its historical range. The Service properly determined that if the frog is to be successfully "conserv[ed]"—that is, brought to the "point at which the measures provided pursuant to [the Act] are no longer necessary," 16 U.S.C. 1532(3)—it is essential to protect that habitat from destruction. And

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[7] Petitioner asserts that restoration would involve "rip[ping] out [its] loblolly forests, terminat[ing] [its] century-lo g timber operations, [and] plant[ing] and grow[ing] longleaf pines." Pet. Br. 37. The Service nowhere indicated that such a wholesale transformation would be called for. Rather, it believed the uplands to "be restorable with reasonable effort." J.A. 167; see also 76 Fed. Reg. at 59,783 (same). Restoration could include, for example, creating additional holes or stumps as "frog refugia." A.R. 3080 (field notes).

when an agency's judgment rests on "scientific determination[s]" as to matters within its expertise, "a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co.* v. *National Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

b. Petitioner's various arguments to the contrary are without merit. Petitioner principally argues—contrary to its position below[8]—that an unoccupied area cannot be "essential" to "conservation" unless it simultaneously contains all of the "primary constituent elements" (PCEs) identified by the Service. Pet. Br. 27 (citation omitted); see Markle Br. 29. As the Service explained, however, see J.A. 121, the Act's text does not support that argument.

Section 3 of the Act makes the existence of specific "physical or biological features" a requirement for *occupied* critical habitat, but it omits that requirement from the immediately following definition of *unoccupied* critical habitat. See 16 U.S.C. 1532(5)(A)(ii). "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015). This contrast in the definitions of the two types of critical habitat supports the conclusion that an unoccupied area may be "essential" even if it currently lacks all features of the species' occupied critical habitat. See, *e.g.*, J.A. 122 ("[T]he presence of the PCEs is not a necessary element for this determination [of unoccupied critical habitat]."). Similarly, the requirement that an area be "essential for the conservation of the species" contemplates the possibility that reasonable restoration

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[8] Petitioner previously acknowledged that "it is not strictly necessary that every [unoccupied] area designated as critical habitat contain all essential habitat elements." Pet. C.A. Br. 28.

might be necessary. See 16 U.S.C. 1532(3) (defining "conservation" to include "all methods and procedures which are necessary" to assist in species' recovery).

At the very least, the Service's interpretation that an unoccupied area may be "essential" even if it does not contain all of the PCEs associated with occupied critical habitat is reasonable and entitled to deference. As with "habitat," the Act does not define the term "essential." 16 U.S.C. 1532(5)(A)(ii). Congress thus entrusted to the Service's judgment the task of reasonably interpreting and applying that standard. See *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2142 (2016) ("[W]here a statute leaves a 'gap' or is 'ambigu[ous],' we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute.") (citation omitted; second set of brackets in original).

Petitioner also suggests (Br. 44-45) that Unit 1 cannot be deemed essential because, in light of its and other landowners' current opposition, the designation may not yield an immediate conservation benefit. But the Act does not contemplate that private landowners may veto a designation of critical habitat, nor demand proof of when or whether conservation efforts will ultimately succeed. Just as a lifeboat may provide "essential" protection to passengers even if it is not ultimately used, so too can Unit 1 provide "essential" protection against extinction in the event of localized disasters in other areas.

Petitioner's reliance on legislative history (Pet. Br. 8-10, 31-32; see Markle Br. 21-22, 32-35) similarly fails. As petitioner notes, the Act did not originally define the term "critical habitat." The Service issued a regulation defining it to include areas "the loss of which would ap-

preciably decrease the likelihood of the survival and recovery of a listed species," as well as "additional areas for reasonable population expansion." 43 Fed. Reg. 870, 874-875 (1978). In 1978, Congress enacted the current definition of "critical habitat." In so doing, however, Congress ultimately rejected language that would have permitted designation of unoccupied areas only if "the species can be expected to expand naturally" to those areas, *A Legislative History of the Endangered Species Act of 1973*: Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess. 1169-1170 (1982) (quoting S. 2899, 95th Cong., 2d Sess. § 2 (as passed by the Senate, July 19, 1978)), or that would have excluded certain "marginal habitat" from eligibility, *id.* at 879-881 (quoting H.R. 14104, 95th Cong., 2d Sess. § 5 (as amended and passed by the House, Oct. 14, 1978)). Moreover, by framing its ultimate definition of "critical habitat" in terms of what is essential for "the *conservation* of the species," 16 U.S.C. 1532(5)(A)(i)-(ii) (emphasis added), Congress demonstrated its understanding that critical habitat would include not only areas necessary for survival, but also those necessary to recover a species from endangered status.

Petitioner mistakenly contends (Br. 35-39) that imposing atextual constraints upon the Act's definition of unoccupied critical habitat is necessary to ensure meaningful limits on the Service's authority. But such limits are furnished by the statutory requirements that the Service reasonably find that a specific area is "essential," 16 U.S.C. 1532(5)(A)(ii), and that it do so using the "best scientific data available," 16 U.S.C. 1533(b)(2). Indeed, the court of appeals upheld the Service's designation only because, "*in this case*, substantial, consensus, scien-

tific evidence in the record supports the Service's conclusion" that Unit 1 was essential for the frog's recovery. Pet. App. 30a n.20.

Petitioner's assertion that the test for unoccupied critical habitat is "*more* stringent" than that for occupied critical habitat, Pet. Br. 36 (citation omitted); see Markle Br. 30-31, is consistent with this understanding. As explained above, to designate an area as occupied critical habitat, the Service need only show that the area contains at least one of the "physical or biological features" that are "essential" to the species. *Home Builders Ass'n*, 616 F.3d at 988-989. For unoccupied critical habitat, by contrast, the Service must determine that the area itself is "essential." 16 US.C. 1532(5)(A)(ii). In practice, it will generally be easier to show that an area has a particular feature than to show that the area itself is, for example, unusually well suited to satisfy an essential conservation need.

The fact that this standard is difficult to satisfy, however, does not mean that it is impossible. Here, the Service determined, based on factors unique to Unit 1, that the area qualified as "essential for the conservation of the species," and both courts below sustained that determination after finding it to be adequately supported by the administrative record. This Court should do likewise.[9]

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[9] If petitioner identifies reason to believe that the designation of Unit 1 is no longer warranted, Section 4(b)(3) of the Act permits it to file a petition to "revise" the existing "critical habitat designation." 16 U.S.C. 1533(b)(3)(D)(i); see 50 C.F.R. 424.14(e).

2. *The Act's other conservation tools have no bearing on the Service's duty to designate critical habitat*

In an effort to minimize the consequences of its unduly narrow interpretation of critical habitat, petitioner points (Br. 39-45) to other conservation authorities set forth in the Act. But those other authorities do not limit the meaning of critical habitat.

As petitioner notes, Section 5 of the Act authorizes the Service to acquire private land for the protection of endangered or threatened species. 16 U.S.C. 1534 (2012 & Supp. IV 2016). That authority operates independently, not instead, of the designation of critical habitat. Indeed, the legislative history cited by petitioner (Br. 40) reflects that "it is beyond [the government's] capability to acquire all the habitat which is important to those species of plants and animals which are endangered today," *1973 House Report* 5, and Congress therefore provided for designation of "critical habitat" to promote species conservation on private and public lands alike.[10] This Court in *Sweet Home* rejected a similar reliance on Section 5 to support a narrow interpretation of the Act's protections of habitat, see 515 U.S. at 693, 702-703, and it should do the same here.

Petitioner's reliance on Section 6 of the Act, 16 U.S.C. 1535, is likewise unavailing. That provision allows the Service to provide funding to state governments, which may use it to support voluntary conservation activities. Again, however, the Act does not contemplate that such activities may stand in for the Service's mandatory duty

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[10] Petitioner's arguments focus on privately owned land. But their proposed limitations on "habitat" and "essential" would apparently apply equally to federal lands and would make it more difficult to protect listed species even on those lands, despite federal agencies' special responsibilities to conserve species. See 16 U.S.C. 1531(c)(1), 1536(a)(1).

to designate a species' critical habitat. In fact, the designation of critical habitat supports voluntary conservation by educating state and local governments, landowners, and the public about areas of importance to endangered species. See, *e.g.*, *Sierra Club* v. *U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 446 (5th Cir. 2001) (noting these "informational benefits"); 81 Fed. Reg. at 7226 ("Specifying the geographic location of critical habitat" helps focus "conservation programs.").

Lastly, Section 10(j) of the Act permits the Service to "authorize the release * * * of any population * * * of an endangered species or a threatened species outside the current range of such species" in order to "further the conservation of such species," 16 U.S.C. 1539(j)(2)(A), and provides that the land onto which that "experimental population" is released generally "shall not be designated" as "critical habitat," 16 U.S.C. 1539(j)(2)(C)(ii). But such a population may be released onto private land only with a landowner's consent, and petitioner has not suggested that it would be amenable to a Section 10(j) release on its property as an alternative to critical-habitat designation.

C. Petitioner's Reliance On Constitutional-Avoidance Principles Is Misplaced

In arguing that Unit 1 is neither "habitat" nor "essential" for "the conservation of the species," petitioner also invokes the canon of constitutional avoidance. See Pet. Br. 32-35; cf. Markle Br. 36-38. "Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018). That canon is inapplicable here, however,

because the principal case petitioner relies on is inapposite; the Act is not sufficiently ambiguous to warrant departure from its text; and the doubts petitioner seeks to raise would not be "avoid[ed]" by its interpretation. *Ibid.*

First, plaintiffs argue that the designation of Unit 1 represents a potentially unconstitutional expansion of federal "jurisdiction." Markle Br. 37; see Pet. Br. 32-34. They note that, in *SWANCC*, this Court stated that "[p]ermitting [the federal agencies] to claim federal jurisdiction over ponds and mudflats" would "result in a significant impingement of the State's traditional and primary power over land and water use" without any clear indication in the Clean Water Act of such intent. 531 U.S. at 174. The Court therefore reasoned that Congress likely did not intend to extend federal regulatory jurisdiction over isolated or ephemeral waters that otherwise lacked any federal nexus.

The designation of critical habitat is materially different. A critical-habitat designation does not create federal "jurisdiction" where none otherwise exists. On the contrary, such a designation has operative effect only to the extent there exists an independent federal nexus to the land. Even then, unlike jurisdictional determinations under the Clean Water Act, the designation of land as critical habitat does not directly impose any legal obligations on private parties; instead, it imposes consultation obligations on federal agencies. 16 U.S.C. 1536(a). Congress acts well within its constitutional authority in specifying the decisionmaking processes that federal agencies must follow in administering federal programs.

Second, petitioner asserts (Pet. Br. 34-35; see Markle Br. 36-37) that excluding Unit 1 from critical habitat is necessary to avoid testing the limits of the Commerce

Clause. But the canon of constitutional avoidance does not authorize courts to override a statute's plan text. See, *e.g.*, *Jennings*, 138 S. Ct. at 842 (recognizing that "[i]n the absence of more than one plausible construction, the canon simply has no application") (citation and internal quotation marks omitted). And here, for the reasons discussed above, the best reading of the Act supports the Service's determination.[11]

Finally, and perhaps most importantly, petitioner does not explain how its interpretation of the Act would resolve the constitutional doubts it posits. Petitioner asserts that the designation of Unit 1 as critical habitat potentially violates the Commerce Clause because "[t]here is no interstate commerce in" the dusky gopher

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[11] In the court of appeals, petitioner "concede[d]" that the "critical-habitat provision of the ESA," properly interpreted, is "a constitutional exercise of Congress's Commerce Clause authority." Pet. App. 37a. To date, every court of appeals to consider the question has held that the Service's actions to protect intrastate species and their habitat are within Congress's power under the Commerce Clause. See *id.* at 42a; *People for Ethical Treatment of Prop. Owners* v. *United States Fish & Wildlife Serv.*, 852 F.3d 990, 1000-1008 (10th Cir. 2017), cert. denied, 138 S. Ct. 649 (2018); *San Luis & Delta-Mendota Water Auth.* v. *Salazar*, 638 F.3d 1163, 1175-1177 (9th Cir.), cert. denied, 565 U.S. 1009 (2011); *Alabama-Tombigbee Rivers Coal.* v. *Kempthorne*, 477 F.3d 1250, 1271-1277 (11th Cir. 2007), cert. denied, 552 U.S. 1097 (2008); *GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622, 640 (5th Cir. 2003), cert. denied, 545 U.S. 1114 (2005); *Gibbs* v. *Babbitt*, 214 F.3d 483, 497-498 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001); *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998). Those decisions have applied, *inter alia*, the principle that intrastate activity can "be regulated as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Gonzales* v. *Raich*, 545 U.S. 1, 36 (2005) (quoting *United States* v. *Lopez*, 514 U.S. 549, 561 (1995)).

frog and the frog currently "live[s] only in Mississippi." Pet. Br. 34. But plaintiffs have not denied that the Service acted "legitimately" in designating critical habitat for the frog at both occupied and unoccupied sites in Mississippi. Markle Br. 16. If petitioner were correct that designating critical habitat for intrastate species is unlawful, there is no logical reason why the (intrastate) designations in Mississippi would be permissible while the (cross-state) designation in Louisiana would not be. And constitutional concerns based upon the asserted "intrastate, noncommercial" character of the species (Markle Br. 37) logically would extend even to land that would satisfy petitioner's view of "habitat" and "essential." Petitioner's reliance on constitutional avoidance is thus misplaced.

II. THE SERVICE'S DECISION NOT TO EXERCISE ITS DISCRETIONARY AUTHORITY TO EXCLUDE UNIT 1 IS COMMITTED TO AGENCY DISCRETION BY LAW

A. The Act Provides No Meaningful Standard To Evaluate The Service's Decision Not To Exclude Land From Critical Habitat

1. The Endangered Species Act expressly authorizes judicial review of certain specified actions or failures to act by the Service and other federal agencies. See 16 U.S.C. 1540(g)(1)(A)-(C). The Act does not otherwise provide for judicial review of the Service's performance of its functions. This Court has held, however, that the Service's application of the Act's substantive regulatory requirements is generally subject to judicial review under the APA. See *Bennett* v. *Spear*, 520 U.S. 154, 175 (1997). Thus, for example, the Service's determination that an unoccupied area is "essential for the conservation of the species," 16 U.S.C. 1532(5)(A)(ii), is judicially reviewable.

Under the APA, however, judicial review is unavailable "to the extent that * * * agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). Agency action is committed to agency discretion where, *inter alia*, the relevant statute provides "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985); see *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (agency action is unreviewable "where 'statutes are drawn in such broad terms that in a given case there is no law to apply'") (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)).

Petitioner's argument that Unit 1 should have been excluded from critical habitat rests upon Section 4(b)(2) of the Act, 16 U.S.C. 1533(b)(2). That provision contains two operative sentences. The first sentence directs that "[t]he Secretary *shall designate* critical habitat * * * on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2) (emphasis added). The second sentence provides that "[t]he Secretary *may exclude* any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.* (emphasis added). The Act articulates only one constraint on that discretion: the Service may not exclude an area if it "determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Ibid.* Thus, while the first sentence establishes a mandatory duty to "consider[]" certain impacts, the

second sentence establishes an optional exclusion process based on a discretionary weighing of benefits.

2. The court of appeals correctly held that the Service's exercise of discretion *not* to exclude Unit 1 under the second sentence of Section 4(b)(2) was committed to agency discretion by law.

First, Section 4(b)(2)'s text provides no general instruction concerning the circumstances in which, if the Service finds the benefits of exclusion to outweigh the benefits of inclusion, the Service should exercise its discretion to either exclude or not exclude an area from the designation. The Act simply provides that, in that circumstance, the Service *may* exclude the area, so long as exclusion would not lead to extinction. It does not identify any set of cases in which the Service *should* do so. The permissive phrasing, lack of standards, and commitment to the Service's "determin[ation]" in the second sentence of Section 4(b)(2)—particularly when read in light of the mandatory provisions in the first sentence—"fairly exudes deference" and reflects Congress's judgment that the Service itself should determine when exclusion is appropriate. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

The legislative record confirms this reading of the statutory text. Section 4(b)(2) was enacted in 1978, and its relevant language first appeared in a House bill. See H.R. 14104, § 2. The House committee stated that, under the bill, "[e]conomics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species," and thus the "determination of critical habitat" would no longer be "a purely biological question." *1978 House Report* 17. The committee explained, however, that "[t]he Secretary is not required to give economics or any other 'relevant impact'

predominant consideration." *Ibid.* Instead, "[t]he consideration and weight given to any particular impact is *completely within the Secretary's discretion.*" *Ibid.* (emphasis added).

In some instances, an agency may supply judicially manageable standards through regulations. See, *e.g.*, *INS* v. *Yang*, 519 U.S. 26, 32 (1996). Here, however, the Service's regulations do not articulate any such standards, but instead simply reaffirm its "discretion." 50 C.F.R. 424.19(c); see 50 C.F.R. 424.19 (2012). And the agency's recent "final policy on exclusions from critical habitat" reaffirms that "the decision to exclude is always discretionary." 81 Fed. Reg. 7226, 7229 (Feb. 11, 2016); see *id.* at 7228 ("[N]othing in the Act, its implementing regulations, or this policy limits this discretion.").

In light of these considerations, both courts of appeals to have considered the question have concluded that the Service's decision not to exclude an area from critical habitat is committed to agency discretion. See Pet. App. 32a-36a; *Building Indus. Ass'n of the Bay Area* v. *United States Dep't of Commerce*, 792 F.3d 1027, 1034-1035 (9th Cir. 2015), cert. denied, 137 S. Ct. 328 (2016); *Bear Valley*, 790 F.3d at 989-990.

B. Petitioner Identifies No Meaningful Standard For Reviewing The Service's Decision Not To Exclude Unit 1

1. In contending that 5 U.S.C. 701(a)(2) does not bar review, petitioner principally relies (Br. 21, 46-47, 50) on this Court's general presumption in favor of judicial review, see *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015), and on the APA's allowance of review for "abuse of discretion," 5 U.S.C. 706(2)(A). But this Court has made clear that the presumption favoring review may be rebutted, including where there exists "no mean-

ingful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830.[12] Here, as Markle acknowledges, the Act "provide[s] no 'meaningful' or 'substantive' standard by which to measure a decision not to exclude." Markle Br. 47 (capitalization and emphasis omitted). And "if no judicially manageable standards are available," it is "impossible to evaluate agency action for 'abuse of discretion.'" *Heckler*, 470 U.S. at 830; see *Building Indus. Ass'n*, 792 F.3d at 1035.

In each case relied upon by petitioner, the relevant statute provided a meaningful standard. *Mach Mining* involved statutory language providing that EEOC "shall endeavor to eliminate [an] alleged unlawful employment practice" by informal methods. 42 U.S.C. 2000e-5(b). The Court explained that the statute was worded in "mandatory, not precatory" terms, 135 S. Ct. at 1651, and "provide[d] certain concrete standards pertaining to what that endeavor must entail," *id.* at 1652. Here, however, Section 1533(b)(2) provides that the Service "may" exclude an area without supplying any such standards.

Bennett v. *Spear*, *supra*, also illustrates these principles. In *Bennett*, the Court considered a claim that the Service failed to consider the economic impact of a critical-habitat designation as required by the first sentence of Section 4(b)(2). The question presented was whether the

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[12] Markle asserts (Br. 40-44) that this Court should abandon the "*Heckler* 'no law to apply' test," citing Justice Scalia's dissent in *Webster*. But what Justice Scalia urged—and what this Court subsequently endorsed in *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993)—is that the "law to apply" test is not the *exclusive* basis for determining that agency action is committed to agency discretion. See *Webster*, 486 U.S. at 607 (Scalia, J., dissenting) ("Our precedents amply show that 'commit[ment] to agency discretion by law' includes, but is not limited to, situations in which there is 'no law to apply.'") (brackets in original).

plaintiffs' claim could proceed under the Act's provision authorizing suit "where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary." 16 U.S.C. 1540(g)(1)(C). The Court held that the first sentence of Section 4(b)(2) established such a duty in providing that "[t]he Secretary *shall* designate critical habitat * * * on the basis of the best scientific data available and after taking into consideration the economic impact" of the designation. 16 U.S.C. 1533(b)(2) (emphasis added).

Petitioner emphasizes (Pet. Br. 46-47; see Markle Br. 49-51) that, in explaining why the citizen-suit provision authorized suit, *Bennett* stated that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact.'" 520 U.S. at 172 (citation omitted; brackets in original). No actual critical-habitat designation had been made, however, and the Court's passing reference to the "abuse of discretion" standard should not be understood to have settled open questions about the circumstances in which the Service's ultimate decision would be reviewable and, if available, under what standards. Cf. *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

In any event, *Bennett*'s dictum is not necessarily inconsistent with the Service's understanding. Review for "abuse of discretion" is available in some cases, including where the Service affirmatively exercises its power under Section 4(b)(2) to exclude an area from critical habitat. In that situation, review is available to ensure that the

Service has not abused its discretion in finding the predicate for exclusion to be established, including that exclusion will not "result in the extinction of the species concerned." 16 U.S.C. 1533(b)(2). Here, however, the Service's decision *not* to exercise its authority implicates no standard that a court could apply on abuse-of-discretion review.

Petitioner asserts that it is anomalous that the Service's decision to exclude would be reviewable, but a decision not to do so would not be. Cf. Pet. Br. 49. But that result follows from the Act's structure and text. Section 4(b)(2) permits the Service to exclude an area from critical habitat only if specified statutory prerequisites are met. If the Service exercises that discretion, a court may review whether those prerequisites were satisfied. By contrast, if the Service *declines* to exercise its discretionary authority, the Act supplies no basis upon which to find an abuse of discretion. See *Bear Valley*, 790 F.3d at 989-990. This distinction between reviewable exclusions, and unreviewable decisions not to exclude, also accords with the overriding purpose of the Act to "halt and reverse the trend toward species extinction." *Sweet Home*, 515 U.S. at 699 (citation omitted); see *ibid.* (noting that this purpose is "reflected not only in the stated policies of the Act, but in literally every section of the statute") (citation omitted).

Markle's assertion (Br. 48) that cost-benefit analysis principles could provide a judicially manageable standard is incorrect. The Service's discretion to exclude exists only if it first finds that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. 1533(b)(2). If the Service makes such a finding, that finding *permits*, but does not *require*, the Service to exclude an area from critical

habitat. The Service thus cannot be held to abuse its discretion in declining to exclude an area simply because the costs of designation are found to outweigh its benefits.

Finally, petitioner's assertion (Br. 54-55) that the Service erred in weighing costs and benefits offers no basis for disturbing the Service's decision. The Service concluded that "[its] economic analysis did not identify any disproportionate costs that are likely to result from the designation." J.A. 190. Petitioner argues that the Service should have given greater weight to its findings concerning economic costs and lesser weight to those concerning biological benefits. But Congress enacted Section 4(b)(2) with the understanding that "[t]he Secretary is not required to give economics or any other 'relevant impact' predominant consideration," and the "weight given to any particular impact is completely within the Secretary's discretion." *1978 House Report* 17.

In any event, as the court of appeals observed, "even were we to assume that [plaintiffs] are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1." Pet. App. 35a. The second sentence of Section 4(b)(2) does not permit a court to compel an exclusion based simply on disagreements about the threshold weighing of costs and benefits. See *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (rejecting the "principle that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable").

2. Petitioner's arguments also overlook that, even though the Service's application of the second sentence of Section 4(b)(2) is committed to agency discretion, its application of the first sentence is not. As *Bennett* held, claims that the Service failed to consider the "economic

impact" or "other relevant impact[s]" of its designation, as required by the first sentence, 16 U.S.C. 1533(b)(2), are reviewable.

Here, however, petitioner challenges the Service's ultimate "refus[al] to exclude Unit 1" from critical habitat, Pet. Br. 52 (capitalization and emphasis omitted), not an alleged failure to consider relevant factors. Indeed, petitioner's argument that the Service should have excluded Unit 1 largely reflects its agreement with the economic-impact scenarios discussed by the Service. See, *e.g.*, *ibid.* (invoking "[t]he Service['s] determin[ation] that designating Unit 1 as critical habitat would eliminate up to $33.9 million in present value of land").

Petitioner asserts in passing that "FWS's analysis of the economic costs of designation also was incomplete." Pet. Br. 54. That assertion does not sufficiently preserve a freestanding claim that the Service's consideration of economic impact under the first sentence of Section 4(b)(2) was arbitrary and capricious. Even if it did, however, the record shows that the Service reasonably analyzed the economic impact of its designation upon Unit 1 using methods it considered reliable. See J.A. 184-190; J.A. 63-98. Petitioner asserts that the Service did not consider "stigma costs" or "the potential loss of oil and gas production." Pet. Br. 54. But the record reflects that the Service accounted for any "potential indirect stigma effect," J.A. 91, 138, and identified the possibility of "oil and gas extraction" as a "key uncertaint[y]" that could have "[p]otentially major" economic impacts, J.A. 92-93.

C. To The Extent The Service's Decision Not To Exclude Unit 1 Is Found To Be Reviewable, It Should Be Upheld

Assuming that the Service's decision not to exclude Unit 1 is reviewable, petitioner urges (Br. 52-56) this Court to decide whether that decision was an abuse of

discretion. The court of appeals, having held the decision unreviewable, did not reach that question. If this Court concludes that abuse-of-discretion review is available, it should remand for application of that standard.

If this Court elects not to remand, it should uphold the Service's decision. Petitioner acknowledges that, if review is available, the agency should be afforded "broad latitude." Pet. Br. 49. Here the record contains a sufficient explanation of the Service's decision not to exercise its discretion to exclude Unit 1. In addition to weighing the benefits of the designation as a whole, the Service considered the specific benefits of designating Unit 1, which contains the best remaining breeding habitat for the species and would protect against stochastic risks. The Service's conclusion that the costs of designation were not "disproportionate" to its benefits must be considered in light of the uniquely valuable habitat that Unit 1 would provide. J.A. 190. And the Act did not bar the Service from relying on the "benefits" it considered. 16 U.S.C. 1533(b)(2). The Service's decision not to exclude the unique area it had just found "essential for the conservation of the species" was not an abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 701(a) provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

2. 5 U.S.C. 706 provides in pertinent part:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * * *

3. Section 2 of the Endangered Species Act of 1973 (Act), 16 U.S.C. 1531, provides in pertinent part:

Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction * * *

* * * * *

(G) * * * ; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding,

for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

4. Section 3 of the Act, 16 U.S.C. 1532, provides in pertinent part:

Definitions

For the purposes of this chapter—

* * * * *

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and

procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

* * * * *

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

* * * * *

5. Section 4 of the Act, 16 U.S.C. 1533, provides in pertinent part:

Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * * * *

(b) Basis for determination

* * * * *

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)

* * * * *

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends

to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

* * * * *

6. Section 5 of the Act, 16 U.S.C. 1534 (2012 & Supp. IV 2016), provides:

Land acquisition

(a) **Implementation of conservation program; authorization of Secretary and Secretary of Agriculture**

The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title. To carry out such a program, the appropriate Secretary—

(1) shall utilize, the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended [16 U.S.C. 742a et seq.], the Fish and Wildlife Coordination Act, as amended [16 U.S.C. 661 et seq.], and the Migratory Bird Conservation Act [16 U.S.C. 715 et seq.], as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc.

Funds made available pursuant to chapter 2003 of title 54 may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

7. Section 6 of the Act, 16 U.S.C. 1535, provides in pertinent part:

Cooperation with States

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) Management agreements

The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 715s of this title.

(c) Cooperative agreements

(1) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and

active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. * * *

* * * * *

8. Section 7 of the Act, 16 U.S.C. 1536, provides in pertinent part:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence

of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth

the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within

180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

* * * * *

9. Section 9 of the Act, 16 U.S.C. 1538, provides in pertinent part:

Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * * * *

10. Section 10 of the Act, 16 U.S.C. 1539, provides in pertinent part:

Exceptions

* * * * *

(j) Experimental populations

(1) For purposes of this subsection, the term "experimental population" means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

(C) For the purposes of this chapter, each member of an experimental population shall be treated as a threatened species; except that—

(i) solely for purposes of section 1536 of this title (other than subsection (a)(1) thereof), an experimental

population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 1533 of this title; and

(ii) critical habitat shall not be designated under this chapter for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before October 13, 1982, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

11. 50 C.F.R. 424.12 (2012) provided:

Criteria for designating critical habitat.

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable

economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the FEDERAL REGISTER and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points *(e.g.,* trees, sand

bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

12. 50 C.F.R. 424.19 (2012) provided:

Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

13. 50 C.F.R. 424.19 currently provides:

Impact analysis and exclusions from critical habitat.

(a) At the time of publication of a proposed rule to designate critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation. The draft economic analysis will be summarized in the FEDERAL REGISTER notice of the proposed designation of critical habitat.

(b) Prior to finalizing the designation of critical habitat, the Secretary will consider the probable economic, national security, and other relevant impacts of the designation upon proposed or ongoing activities. The Secretary will consider impacts at a scale that the Secretary

determines to be appropriate, and will compare the impacts with and without the designation. Impacts may be qualitatively or quantitatively described.

(c) The Secretary has discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. In identifying those benefits, in addition to the mandatory consideration of impacts conducted pursuant to paragraph (b) of this section, the Secretary may assign the weight given to any benefits relevant to the designation of critical habitat. The Secretary, however, will not exclude any particular area if, based on the best scientific and commercial data available, the Secretary determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Respondent,

and

CENTER FOR BIOLOGICAL DIVERSITY and
GULF RESTORATION NETWORK,

Intervenor-Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR INTERVENOR-RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Article III's case and controversy limitation requires dismissal of a landowner's challenge to a government action that imposes no restriction on a parcel's use—either currently or "for the foreseeable future"—and whose potential effect on possible later use has been adjudged "too speculative" to support standing.

2. Whether the Fish and Wildlife Service properly determined that for purposes of the Endangered Species Act Unit 1 is "critical habitat" for the dusky gopher frog.

3. Whether the court of appeals correctly construed the provision of the Endangered Species Act regarding administrative discretion to exclude particular areas from a species' critical habitat.

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BRIEF FOR RESPONDENT-INTERVENORS

INTRODUCTION

This case concerns the federal government's statutory responsibility to conserve a critically endangered species. For likely millions of years and well into the twentieth century, *Rana sevosa*—the dusky gopher frog—could be found in the ephemeral ponds and surrounding forested uplands of what is now the southern coastal United States, including on the Louisiana land the Fish and Wildlife Service designated "Unit 1." But a confluence of forces buffeted the species in the last century, reducing it to a sole population subsisting on a single Mississippi pond, one event away from final, irreversible loss.

In the Endangered Species Act, Congress directed the Service to designate "critical habitat" for every such species—at the earliest possible opportunity and based on the best science. And Congress further resolved that for imperiled species whose ranges have been curtailed, the Service must go beyond the places where the species is found at the time of listing, to include *unoccupied* areas that are "essential for [its] conservation."

On those plain terms, Unit 1 is "critical habitat," and the Service's designation was proper and lawful. It is a scientific reality that the areas designated critical habitat for the frog in Mississippi, including the unoccupied ones, leave the species with no realistic path to recovery and at genuine risk of demise from a single localized event. And it is likewise a matter of consensus that Unit 1 provides the best additional prospect for conserving the species. Its characteristics are responsive to the problems that make the other areas insufficient, and its physical features and

condition are comparable to those designated without objection in Mississippi. (It is not—contrary to petitioner's colorful but wholly unscientific insinuations—a lethal environment for the frog.)

Petitioner's proposals to read "essential for the conservation" as a *prohibition* against designating areas that are imperfect, but restorable, or are privately owned, make no sense under the Act. And petitioner's claim to have uncovered—in the provision directing prompt designations—an independent restriction on what critical habitat means is, as a textual matter, a non-starter. Nor should—or could—this Court accept petitioner's plea to impose "limiting principles" on top of the statute Congress enacted. The statutory design operated properly here. Indeed, the larger story of the critical habitat program's administration has been one of extreme agency reticence and intense congressional oversight.

This case itself illustrates the dramatic divergence between the perceptions petitioner seeks to foster and reality: For all the assertions about crushing burdens that critical habitat designations impose, petitioner has not even incurred the sort of actual, concrete injury that this Court has held is the minimum to invoke federal jurisdiction.

STATEMENT OF THE CASE

A. Statutory Background

1. The Endangered Species Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). In enacting the law, Congress recognized that losses from extinctions are irreversible and incalculable—that any

imperiled species could hold "answers to questions which [humanity] ha[s] not yet learned to ask." *Id.* at 178. But Congress also determined that these harms are preventable—the "trend toward" extinctions can be "halt[ed] and reverse[d]." *Id.* at 184. The Act expresses Congress's further judgment that species conservation and economic activity are compatible, so long as the latter is "[ ]tempered by adequate concern" for the former, 16 U.S.C. § 1531(a)(1), and the "best scientific data" and full range of "methods and procedures" to help species recover are employed. *See id.* §§ 1532(3), 1533(b)(2).

2. The Act charges the Secretary of Interior (and the Department's Fish and Wildlife Service) with responsibility for identifying and publicly listing all endangered fish, wildlife, and plant species, ascertaining the causes of each species' fragile status. *Id.* § 1533(a)(1). Once a species is listed, Section 9 of the Act prohibits its unauthorized "taking," by any actor, public or private, anywhere within the United States. *Id.* § 1538.

3. Section 7 of the Act imposes a further obligation, applicable only to agencies of the federal government: They must "insure," through a process of consultation with the Service, that their activities are not likely either to "jeopardize the continued existence of any endangered species" or to cause "destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." *Id.* § 1536(a)(2).

4. Section 7's separate, textual protection for critical habitat is of a piece with the Act's emphasis on the interdependence between species and broader "ecosystems," *see id.* § 1531(b), and on the significance

of habitat destruction as both a cause of extinctions and an obstacle to recovery, *see id.* § 1533(a)(1); *Hill*, 437 U.S. at 179. But when originally passed in 1973, the Act did not specify when and how critical habitat designations should occur, nor did it elaborate on what areas should be determined to be critical habitat. In 1978 amendments, Congress added new provisions to Sections 3 and 4, addressing those matters.

5. Sections 4(a)(3) and 4(b)(2) require the Service, "to the maximum extent prudent and determinable," to designate critical habitat for a species "concurrently" with its listing and to do so through notice-and-comment rulemaking "on the basis of the best scientific data available," 16 U.S.C. §§ 1533(a)(3), 1533(b)(2), "after taking into consideration the economic [and other] relevant impact" of designation, *id.* This concurrent designation regime, Congress recognized, in addition to ensuring earlier protection for biologically important and vulnerable areas, would reduce the prospect of large public undertakings' being halted midway, as the Tellico Dam had been in *Hill*, based on late-emerging species-protection concerns.

6. Section 3(5)(A) addresses which areas the Service should designate as "critical habitat," providing a two-part definition of what, "[f]or the purposes of th[e Act]," "the term 'critical habitat'" means. The first part recognizes that not every area where an endangered species is found is critical habitat. Rather, determinations for occupied areas must focus on those "specific areas" which contain "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i).

The second part, Section 3(5)(A)(ii), codifies Congress's understanding that merely protecting the curtailed or degraded areas an endangered species currently occupies will, for many species, preclude recovery. It therefore provides that "[t]he term 'critical habitat'" also means those areas *not* occupied at the time of listing that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

7. Although Congress addressed the substance and procedures for critical habitat designations in 1978, the *effect* of designation did not change (and has not changed since). Private owners of designated lands retain all the incidents of ownership—including rights to exclude, sell, and use the land as they see fit—subject to the qualification that *federally*-supported or -authorized actions with respect to the land potentially will be subject to the Section 7 consultation process.

When such consultations do occur, the Service's opinions almost never stop or severely restrict projects, and the vast majority of consultations terminate informally. *See* Jacob Malcolm & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, 112 Proc. Nat. Acad. Sci. 15844, 15844-49 (2015) ("Malcolm & Li"). Indeed, a recent, rigorous study found the Service only made two formal jeopardy or adverse modification determinations in more than 88,000 consultations between 2008 and 2015, and, even then, both projects proceeded. *Id.* But as the authors also found, the interactive process often does lead the Service—or the project proponents themselves—to identify minor adjustments that have significant species conservation benefits. *Id.*

B. The Dusky Gopher Frog

1. *Rana sevosa* is an amphibian species native to pine-forested wetlands of the southern coastal states between the Mississippi River in Louisiana and the Mobile River Delta in Alabama. 66 Fed. Reg. 62,993, 62,993 (Dec. 4, 2001).

2. The frog takes its common name from its generally reclusive behavior. Like the gopher tortoise, whose burrows the frog often shares, it spends much of its life in underground refuges, which enable the frog to evade predators and to maintain the moist skin it needs for breathing and for controlling salt-water balances. *Id.* at 62,994.[1]

3. Dusky gopher frog reproduction, however, occurs in shallow ponds, where females attach fertilized eggs to vegetation and tadpoles hatch and remain until completing metamorphosis. The kinds of ponds capable of supporting the species are rare. They must be open-canopied—the absence of sunlight is believed to be life-threatening to dusky gopher tadpoles, J.A. 151; isolated from other water bodies; and "ephemeral," meaning they dry completely. J.A. 145. Moreover, the "hydroperiod" of such ponds is highly

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[1] Although the opinion dissenting from rehearing denial made light of the frog's seemingly maladaptive tendency to cover its own eyes in the presence of danger, *see* Pet. App. 125a, the species is not defenseless. Like many related species, the dusky gopher frog secretes a bitter milky substance when under threat and produces a variety of peptides that enable it to effectively combat microbial infection. Though the species' numbers are far too small to allow experimentation, such chemicals have shown significant promise for developing human therapies. *See generally* Eric Chivian & Aaron Bernstein, Sustaining Life: How Human Health Depends on Biodiversity 213-19 (2008) ("Potential Medicines from Amphibians").

specific. There must be sufficient rainfall—at just the right time—to fill ponds long enough for tadpoles to metamorphose, but not so long as to allow predatory fish populations to take hold. J.A. 151-53.

4. After breeding, mature dusky gopher frogs and successful juvenile metamorphs make their way from ponds to surrounding forested uplands, where they seek out burrows, tree stump holes, and root mounds in which to live. J.A. 150.

That relatively short journey can be perilous, especially to juveniles (which are at heightened risk of predation and desiccation, J.A. 23, 24, 150), and it can be impeded by dense brush, J.A. 157. For that reason, and others, the species benefits from the wildfires that are common in southern pine forests. Such fires pose a danger to individual frogs, but in addition to clearing the understory, they fell trees (producing additional refuges) and enrich pond and upland soils, J.A. 193 (enabling growth of plants to which eggs attach, J.A.153, 159, and ones that nourish insects the frogs eat, J.A. 149).

C. Administrative Proceedings

1. ***Listing.*** In 2001, the Service listed the dusky gopher frog as an endangered species. 66 Fed. Reg. 62,993 (Dec. 4, 2001).[2] At the time of listing, the population on Glen's Pond in the DeSoto National Forest, estimated at 100 adult frogs, was believed to be the only remaining one. *Id.* at 62,994-95. In

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[2] The Service had initially identified the frog as a "distinct population segment" of a different species and referred to it as the "Mississippi gopher frog," but it later determined, after substantial scientific input, that *Rana sevosa* and "dusky gopher frog" are the correct taxonomy and nomenclature. J.A. 101-02.

subsequent years, small numbers of breeding pairs and egg masses were found on three other ponds, *see* J.A. 148, but the Glen's Pond population remains the only established breeding population, accounting for 135 of the 160 frogs estimated to be alive in the wild in 2015. U.S. Fish and Wildlife Serv., 5-Year Review: Summary and Evaluation 8 (2015) ("5-Year Review").

The Service identified habitat curtailment and degradation as a central cause of the species' endangerment and a principal obstacle to its prospects for recovery—and survival. 66 Fed Reg. at 62,997. Both ephemeral ponds and surrounding pine forests have been destroyed or compromised by human activities such as urbanization, flood control, agriculture and timber harvesting—and attendant efforts to suppress wildfires. *Id.* at 62,998-99. The Service recognized that the species' small population size and geographic concentration as an independent danger. *Id.* These can cause inbreeding and loss of genetic diversity, reducing individual fitness and the species' capacity to adapt to new threats, and made the frog vulnerable to "random demographic events." *See id.*

The Service did not designate critical habitat for the dusky gopher frog at the time of the 2001 listing, citing budgetary constraints, 66 Fed. Reg. at 63,000, and undertook to do so in 2010, as a result of a suit brought by respondent-intervenors. *See* 75 Fed. Reg. 31,387, 31,389 (June 3, 2010).

2. ***Critical Habitat Designation.*** The Service initially proposed to designate 385 acres currently occupied by the frog and 1,572 unoccupied acres, all in and around the DeSoto Forest. 75 Fed. Reg. at 31,395. In selecting these areas, the Service, consistent with

its then-governing regulations, 50 C.F.R. 424.12 (2012), identified three "primary constituent elements" ("PCEs") of dusky gopher frog habitat, derived from research on the Glen's Pond population and studies involving related species: (1) ephemeral ponds, (2) upland forest, and (3) suitable areas connecting the two. *See* 75 Fed. Reg. at 31,391-94. The Service further highlighted the special importance of multiple breeding ponds in close proximity to one another, as a "metapopulation structure" would enable individuals to move between ponds, improving genetic variation and species resilience. *Id.*[3]

The designation proposal recognized that the eleven Mississippi sites the Service had identified were not in turn-key condition. Rather, at the time of listing (and of the 2010 proposal), each area required active management to benefit the recovery of the frog. 75 Fed. Reg. at 31,393. In particular, the Service explained that several sites had been chosen based on their "restoration potential" and reported that "[h]abitat restoration efforts" to date "ha[d] been successful in establishing at least one of the PCEs on each of the[] sites" it proposed. *Id.* at 31,389, 31,394.

a. Pursuant to longstanding agency policy, the proposal was distributed to peer reviewers—independent scientists with expertise in conservation

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[3] The Service described these "elements" largely as a gloss on the "physical or biological features" language of the Section 3(5)(A)(i) definition applicable to occupied areas. 75 Fed. Reg. at 31,389-91. In a subsequent rulemaking, the Service, citing persistent confusion about the significance of the non-statutory PCE concept, decided to jettison it. *See* 81 Fed. Reg. 7,414, 7,426 (Feb. 11, 2016). Those regulations are not currently in force, on account of a recent settlement agreement whereby the Service pledged to "reconsider" them. *See* Petr. Br. 11 n.7.

biology, amphibian species, and the dusky gopher frog particularly. *See generally* Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities, 59 Fed. Reg. 34,270 (July 1, 1994).

These scientists proved "united in their assessment" that the Mississippi units were "inadequate for the conservation of the dusky gopher frog." J.A. 124. In particular, they expressed concern about concentrating recovery efforts in one single area in Southwest Mississippi. *See, e.g.*, J.A. 52-53 (Pechmann). Doing so would leave the species vulnerable to serious threats—from invasive species, drought, and disease—that are "likely to occur at the same time at sites near each other." J.A. 125. In fact, disease had caused a "mass die-off" of tadpoles at Glen's Pond in 2003, 5-Year Review at 16; and in 8 of the 15 breeding seasons between 2001 and 2015, rainfall there was insufficient for any tadpole to reach maturity. *Id.* at 21. The peer reviewers urged the Service to look elsewhere within the species' historical range. J.A. 124.

b. The Service returned then to the field, conducting reassessments in Alabama and Louisiana. *Id.* The "primary focus of [the] reanalysis" was to identify "open-canopied, isolated, ephemeral ponds"—on account of their "rarity" and singular "importance to survival of the species." *Id.*

The ponded areas in Alabama that the Service identified using remote sensing and aerial photography proved to be "poor habitat" on closer examination—they contained fish and woody shrubs and were no longer surrounded by forests. J.A. 127-28.

The Service accordingly declined to designate them. *Id.*

Turning to Louisiana, the Service examined Unit 1, privately owned forest currently used for petitioner's commercial timber harvesting operations and the site of the pond on which the species was last seen in that state. J.A.124. Ultimately, the agency determined that the area has five ephemeral ponds that are fully intact and include "an open canopy with emergent herbaceous vegetation for egg attachment." J.A. 122, 153. Indeed, "[b]ased on the best scientific information available," these ponds, close enough together to promote metapopulation structure, were found to "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." J.A. 125.

In addition to its unique combination of rare pond quality and proximity, the area contains adjacent upland pine forest habitat that, though densely grown, "retains some stump holes and could be restored to suitable upland habitat for *R. sevosa*." AR1568 (Pechmann peer review comment); *see also* AR6744-45 (photos of Unit 1 burrows).

c. The Service also considered the economic impact of its designations. *See* 16 U.S.C. § 1533(b)(2).

With respect to Unit 1, the analysis recognized the critical habitat designation would have no effect on petitioner's timber harvesting and that there was substantial uncertainty as to whether, if at all, designation might affect any future development activity. Petitioner (and the landowners) would be unaffected by the designation if their development activity did not require federal action, such as a Clean Water Act permit; or if a permit process did not trigger

a Section 7 consultation or such consultation did not impair the redevelopment. J.A. 68. In addition to these zero-cost scenarios, the analysis considered the losses owners could incur if the hypothetical consultation pared back redevelopment partially or entirely, estimating these costs at $20.4 and $33.9 million, respectively. J.A. 68-69.

The analysis doubted petitioner's claims of unique value for the particular parcel, noting that St. Tammany Parish had 300,000 acres of developable land, some 43,000 of which were property of Unit 1's owners. J.A. 54, 87. And it further noted, but did not quantify, the significant non-species benefits of critical habitat designations, including increases to the value of nearby property. J.A. 97-98.

d. The 2012 Final Rule designated critical habitat for the dusky gopher frog consisting of 6,477 acres, of which 3,501 are federal lands, 264 are state-owned, and 2,711 are privately owned (of which Unit 1 accounts for 1,544). J.A. 166. The Service concluded that the potential benefits of excluding Unit 1 from designation, when compared to the biological and non-biological benefits of designation, did not warrant exercise of its discretionary exclusion authority. J.A. 190.

D. Judicial Proceedings

1. Petitioner and two groups of landowners filed three separate lawsuits challenging the designation of Unit 1 on statutory and constitutional grounds. The suits were consolidated by the district court, which granted respondent-intervenors' motion to intervene. Pet. App. 89a. The district court refused to dismiss for lack of standing, *id.* 95a, but upheld the critical habitat designation on the merits, *id.* 99-122a.

2. On appeal, petitioner disclaimed any disagreement with the Service's scientific judgments concerning the plight of the species, the need for additional out-of-state breeding populations, or the singular character of the ponds on Unit 1; and it endorsed the Service's conclusion that "it is easier to restore terrestrial habitat than to restore or create breeding ponds," C.A. Br. 36. Petitioner maintained, however, that the Service's determination that Unit 1 is "essential for the conservation" of the frog was arbitrary and capricious, given the land's current use and the owners' stated unwillingness to allow reintroduction or undertake restoration measures. *Id.* 24-41. Petitioner further argued that if the Act were construed to authorize this designation, it should be held unconstitutional. *Id.* 44-51.

3. The Fifth Circuit affirmed the district court's judgment, holding that petitioner had standing to sue, but that its substantive challenges lacked merit. Pet. App. 47a. As to jurisdiction, the court recognized that petitioner's claims of "lost future development" were "too speculative" for Article III, *id.* 12a, but that its claims of reduced property value were legally sufficient, *id.* 13a. On the merits, the court held that the Service had lawfully concluded that Unit 1 falls within the statutory "critical habitat" definition, *id.* 21a-32a, and that the designation did not violate the Commerce Clause, *id.* 32a, 44a. It then held that the Service's decision not to exercise its authority to exclude Unit 1 from designation on economic grounds was not subject to judicial review. *Id.* 36a.

Petitioner sought en banc rehearing, again emphasizing that the statutory definition controlled, but renewing its contention that the Service's

interpretation of "essential for the conservation of the species" was insufficiently stringent. Pet. Rh'g En Banc 7-9. The court of appeals denied rehearing, but Judge Jones's opinion dissenting from that denial advanced a different theory than the one pressed by petitioner and the panel dissent. The opinion faulted the Service not for its interpretation of the statutory definition but rather for neglecting a "habitability" requirement implicit in Section 4(a)(3), which describes the Secretary's concurrent designation obligation as reaching "any *habitat* of such species which is then considered to be critical habitat." *Id.* 132a (quoting 16 US.C. § 1533(a)(3) (emphasis added)).[4]

SUMMARY OF ARGUMENT

I. Although the decision below was unassailably correct on the merits, the court erred in concluding that petitioner's case cleared the jurisdictional threshold. For all its lamentations about oppressive costs, petitioner has not suffered the concrete injury-in-fact that Article III requires. The critical habitat designation does not restrict the activity that petitioner pursues now on Unit 1 and intends to for the "foreseeable future"—cultivating and harvesting timber commercially. And it is wholly speculative, indeed quite *un*likely, that the designation will actually impair the landowners' ability to profitably redevelop the land at some undetermined future time.

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[4] The dissenting opinion acknowledged that petitioner had not advanced this argument—its briefs twice quoted Section 4(a)(3) and both times replaced the word "habitat" with "lands," *see infra*, p. 42. But Judge Jones posited that the omission—which she ascribed to unspecified "tactical reasons," Pet. App. 138a—should not preclude deciding the case on this basis, *id.* 132a.

The mere fact that a hypothetical buyer might take account of these same remote contingencies does not transform constitutionally inadequate potential future harm into actionable present injury.

II. On the merits, this case turns on what the Endangered Species Act's critical habitat provisions require—and what they forbid—with respect to the dusky gopher frog. Congress required the Service to designate "critical habitat" for every endangered species, and no one denies that that obligation extends to areas, like Unit 1, that the species long inhabited but no longer does. Nor is there any ambiguity as to the substance of that obligation: When a not-occupied area is "essential for the conservation of the species," it is considered "critical habitat" for purposes of the Act and must be designated as such.

This clear and express directive and the legislative judgments on which it rests control this case. On any sensible reckoning, Unit 1 is "essential for the conservation" of the dusky gopher frog. Whatever aspersions petitioner casts on Unit 1, it is a matter of scientific consensus that relegating this species to the areas designated in Mississippi (including unoccupied areas designated there) would leave the species at risk of extinction and would doom its recovery prospects. Unit 1 was selected because its characteristics are responsive to these urgent conservation needs. Petitioner has never refuted or even seriously contested these scientific judgments, nor claimed that the Service was wrong to adjudge Unit 1 the most promising habitat for the species within its historic range.

Unable to claim that Unit 1 is not essential in the ordinary sense, petitioner purports to deduce two

other prohibitions from the statutory definition. First, eliding the difference between an environment that is deadly to a species and one that is suboptimal, petitioner proposes that Section 3(5)(A) prohibits the Service from designating anything but turn-key-ready unoccupied habitat.

That is not what "essential" connotes in ordinary parlance, and it is surely not what "essential for the conservation of the species" means under the Endangered Species Act. The text of Section 3(5)(A), considered in light of its place in the overall statutory scheme, leaves no doubt that urgently needed, reasonably restorable habitat may—and, in the circumstances here, must—be designated. Nor, contrary to petitioner's suggestions, may the mandate to designate essential areas permissibly be construed to mean such areas cannot be designated if under private ownership. Congress did not limit the critical habitat program to federal lands either directly or indirectly, by somehow making federal acquisition a precondition of designation. The Act's unitary approach to "critical habitat" reflects both the common-sense reality that an area's biological significance and its ownership status are separate matters and Congress's recognition that the Act's species and habitat conservation programs could and should operate within the context of private ownership and economically productive land use.

That leaves petitioner to argue that Congress in some other way forbade the Service to designate Unit 1, or that the Court should impose a restriction that Congress did not:

III. Petitioner's central submission here is that critical habitat does not mean what Section 3(5)(A)

says "the term" "means" "[f]or the purposes of" the Act—specifically that "habitat . . . considered to be critical habitat" in Section 4(a)(3) means something different from—and more restrictive than—"critical habitat." But the plain text and structure of the Act foreclose that theory. They instead show that the ostensibly game-altering provision can only mean what *petitioner said* it does in its court of appeals briefing: that the Service must designate lands that meet Congress's critical habitat definition, as promptly as possible. Accepting petitioner's purportedly "textual" proposal would make a hash of an integrated statutory regime that has operated coherently since its enactment four decades ago.

IV. As for petitioner's argument that a further restriction must be imposed for policy reasons, this Court has no such legislative authority. The statutory regime that Congress enacted, which requires designations to proceed by regulation, species-by-species, and area-by-area already provides a welter of legal, scientific, procedural, and judicial checks which together ensure against overreach in the Service's discharge of its designation responsibilities. Were these controls in any way deficient, the *political* checks on the Service's authority are notoriously potent. That is why critical habitat designations have, for decades, been a chronically under-enforced component of the Act's species conservation program.

V. Nor do petitioner's appeals to the "presumption of reviewability" offer a path to reversing or even remanding the Unit 1 designation. Non-exclusion is part-and-parcel of the decision to designate, and both courts reviewed *that* action. Petitioner's case would come out no differently even if the Court *could* review

the Service's cost-benefit analysis: The Service refused to exclude an area it had—properly and lawfully—determined to be essential for the species' survival; and, bluster aside, there is a significant likelihood that the economic cost of designation (and non-exclusion) is zero. But the decision below was correct to refuse the kind of review petitioner pursues here in any event. This Court long ago recognized that the judiciary's power to review critical habitat designations does not extend to setting them aside on economic grounds. Nor may courts do that through the backdoor, in the guise of reviewing the agency's choice to *not exercise* its discretion to exclude.

ARGUMENT

I. Petitioner has incurred no harm sufficient for Article III jurisdiction.

1. Petitioner has not shown the "irreducible constitutional minimum" to invoke the jurisdiction of a federal court: an "injury in fact," which is both "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). At the time it filed suit, petitioner was using Unit 1 to harvest timber under a lease that is in effect until 2043, and petitioner has expressly represented its intention to continue doing so for the "foreseeable future." C.A. Br. 7-8 & n.25. And it is indisputable that the regulation designating Unit 1 as critical habitat has no effect on petitioner's right to do that. *See* Petr. Br. 44.

Petitioner's claims of injury instead depend on what could possibly occur when (and if) the landowners undertake to redevelop this part of their property for

residential and commercial use. In that event, petitioner maintains, it is *possible* that a "dredge-and-fill" permit under the Clean Water Act would be necessary, *see* 33 U.S.C. § 1344; which *might* then lead to an inter-agency Section 7 consultation concerning adverse habitat modification; which *could* result in the identification of modifications that *might* lead to the land's being developed less profitably than it otherwise would.[5]

The decision below properly held this impairment-of-future-development-theory "too speculative" to constitute actionable imminent injury. Pet. App. 12a. A stated intention to do something at some unspecified juncture—beyond the "foreseeable future," C.A. Br. 8—"when market conditions are amenable," J.A. 80, is precisely the sort of "'some day' intention[]" this Court has held cannot suffice under Article III. *Lujan*, 504 U.S. at 564.

But even if the redevelopment effort were concrete and impending, petitioner's future injury claim would still entail piling contingency upon speculation. Petitioner (unsurprisingly) has never squarely alleged, let alone established, that a federal permit would be required in order to proceed with redevelopment. (Nor has it established that a permit would be forthcoming in the absence of Endangered Species Act considerations, which implicates the *other* Article III requirements—causation and redressability.)

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[5] Petitioner represents that it is primarily the lessor and "operator" of Unit 1, though it apparently owns some 152 acres there. Pet. App. 88a. This discussion does not depend on the distinct complexities raised by petitioner's asserting the rights of the predominant owners.

And petitioner has not established—nor could it—that a significant project modification is the "reasonably likely" outcome of the consultation the (hypothetical) permit application would trigger. On the contrary, government data show that the sort of outright prohibitions about which petitioner thunders essentially never happen, and that even substantial restrictions are a vanishingly rare exception. *See* Malcolm & Li at 15846 (finding that no project was "stopped or extensively altered" in the 88,290 consultations between 2008 and 2015).

But even then, it is entirely uncertain that a proposed species-protective modification would actually adversely affect the project's bottom line. As the Administrative Record in this case attests, a large planned residential community was built adjacent to Glen's Pond, and a Biological Opinion for that development determined it would not jeopardize the dusky gopher frog, noting the developer's agreement to avoid construction on a narrow strip of land immediately adjacent to the pond. AR4574, 4582. Given that Unit 1 comprises a small fraction of the landowners' 45,000-acre portfolio in St. Tammany Parish, J.A. 54, there is a substantial likelihood that their development project could proceed likewise, with modest but meaningful species-protective adjustments.

The uncertainty of *any* hindrance of any not-yet-begun redevelopment is reflected throughout the economic analysis, which "estimated" the impact of critical habitat designation to be anywhere from $0 to $33.9 million. J.A. 67. (The analysis recognized, but made no effort to quantify, offsetting economic *benefits* that can accrue to private developers. J.A. 97-

98.) Such uncertainties defeat petitioner's ability to establish the imminent injury that standing requires.

2. Regrettably, the Fifth Circuit held this very same remote and contingent risk of future injury to be *sufficient* for standing, when reflected in a claimed market valuation. Pet. App. 13a. But Article III limitations do not permit plaintiffs to transform conjectural future harms into actionable, concrete injuries simply by positing that a hypothetical purchaser would pay more for a property were there no risk of future regulation. This Court rejected such an attempt in *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 811 (2003). There, the petitioner contended that uncertainty as to the applicability of the Contract Disputes Act, *see* 41 U.S.C. § 7101 *et seq.*, caused its members real harm because potential concessioners would take account of the uncertainty by lowering their bids. 538 U.S. at 811. The Court held that "mere uncertainty as to the validity of a legal rule" could not constitute a "hardship for purposes of" Article III's ripeness requirement. *Id.*[6] Were it otherwise, this Court reasoned, "courts would soon be overwhelmed with requests for what essentially would be advisory opinions because most business transactions could be priced more accurately if even a small portion of existing legal uncertainties were resolved." *Id.*

Petitioner's claims—that a hypothetical purchaser would incorporate the uncertainty arising from a critical habitat designation into an offer to buy Unit

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[6] As courts regularly recognize, there is no substantive difference in these circumstances between Article III's "hardship" (ripeness) and "concrete injury" (standing) requirements. *See, e.g., Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010).

1—are no different. *See* Pet. App. 13a. Indeed, unlike the challengers in *NPHA*, who were making bidding decisions—and, by hypothesis, suffering actual hardship as a result of the uncertainty—petitioner has never claimed any concrete intention to sell its 152 acres or that it would have done so absent the challenged designation.

To be sure, the regulation here, unlike the one challenged in *NPHA*, is directed at Unit 1, and this Court has said that injury is more readily established when the plaintiff itself is "an object of the [challenged] action," *Lujan*, 504 U.S. at 561-62. But that observation bears only on particularity, and the Court has "made it clear time and time again that an injury in fact must be both concrete *and* particularized." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Even where a plaintiff can show violations of "his [own] statutory rights," dismissal is required if the violations "result in no harm." *Id.* at 1548, 1550.

That does not mean that a property owner need allege an intent to sell in order to challenge an actual land use restriction—or that decreased market value is not a permissible measure of damages. But in such cases, the government action has directly—and definitively—impaired a significant component of the plaintiff's ownership rights. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001). Here, the Service has not asserted "jurisdiction" over Unit 1, Markle Br. 37; the landowners have the same rights of use and exclusion they enjoyed before designation. Were petitioner's actuarial approach to prevail here, the uncontroversial justiciability rules for property regulation cases would be a dead letter: The "market"

can always be expected to value a parcel that might (but might not) be developable with a zoning variance less than one that may be developed as of right. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (claim is not ripe until challenger has unsuccessfully sought a variance).

3. Even if petitioner's showings satisfied the minimum injury requirements for standing, dismissal, on Article III ripeness grounds, would be warranted. *See NPHA*, 538 U.S. at 808 (federal courts may consider ripeness on their "own motion"). When as here, a government action cannot affect what a would-be challenger does and intends to do for the foreseeable future, there is no "hardship" in withholding immediate adjudication. *Id.* And there are clear benefits to withholding consideration here. It is entirely possible that the various contingencies on which petitioner's claim depends will never materialize. At the very least, a court's consideration of petitioner's claims of millions of dollars in losses—not to mention its intimations of "constitutional doubt"—will "stand on a much surer footing," *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967), if it occurs in the context of an actual permit application or consultation. *Cf. MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.").

II. The Service lawfully designated Unit 1 as critical habitat for the dusky gopher frog.

This case is about what Congress required and what it prohibited in critical habitat designations. Congress unambiguously defined what "critical habitat" means under the Act, and that clear and

express definition describes Unit 1 to a T. It is a matter of scientific consensus that additional areas outside ones currently occupied by the species are urgently necessary—"essential"—and that Unit 1 is, in its current condition and subject to the sort of restoration practices pursued in the other designated units, singularly responsive to the conservation imperatives of this imperiled species.

A. Unit 1 is critical habitat, as a matter of law, because it is essential for the conservation of the dusky gopher frog.

1. There is no ambiguity as to what the Service must consider "critical habitat" for a particular endangered species. In Section 3, Congress directly and specifically spoke to what, "[f]or the purposes of" the Act, "[t]he term 'critical habitat' . . . *means*." Those:

> (i) specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; *and* (ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. §§ 1532, 1532(5)(A) (emphasis added).

The import of that provision is plain. For starters, Congress's specific reference to "areas outside the geographical area occupied by the species" leaves no doubt that the Service's critical habitat designations are *not* to be confined to areas where an endangered species is currently or ordinarily found. Thus, whatever the phrase "critical habitat" might otherwise

connote, as used throughout the Act, the term extends fully to areas the species does not currently occupy.

Other provisions of the Act make equally plain the logic underlying that directive. First, Congress committed to conserving every endangered fish, wildlife, and plant species—with "conservation" meaning "the use of all methods . . . necessary to bring" each listed species back "to the point at which" statutory interventions are "no longer necessary." 16 U.S.C. § 1532(3). Moreover, Congress recognized that "curtailment," "modification," and fragmentation of habitat was, for many extinct species, the primary cause of loss, and the most serious threat to surviving but endangered species. *See id.* §§ 1531, 1533(a)(1); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978). Together, these commitments compel the conclusion that the Service may not allow a species to further decline *because* these forces have relegated it to inadequate habitat. And Congress specified that scientific judgments are paramount—albeit ones based on the best "data *available*," 16 U.S.C. § 1533(b)(2) (emphasis added), reinforcing that, for matters the Act addresses, time is of the essence.

Congress's carefully considered definition does not leave the Service unguided in discharging its responsibility to designate unoccupied areas. The Act specifies that any such area be "essential for the conservation of the species" at issue, and the term "essential" is, as petitioner says, readily understood to mean "absolutely necessary [or] indispensable" or "important in the highest degree." *See* Petr. Br. 28 (quoting dictionaries).

Thus, the provision's affirmative thrust is that critical habitat *must* be designated, promptly, when

an area is truly necessary to address some conservation imperative for a species. But it also means that the Service should refrain from designation when a particular unoccupied area is *un*important or *un*necessary or dispensable—or when conservation is not really at stake.

2. This plain meaning of the express definition, together with the statutory judgments it implements, establish the correctness of the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. First, preventing extinction is truly of utmost importance under the Act. A species cannot be conserved unless it survives. And survival is the current and most realistic goal for the dusky gopher frog. 5-Year Review at 5. There are "only up to a few hundred individuals of the species in the wild," J.A. 39 (Richter), and, given the forces arrayed against it, the species' survival to date is a matter of statistical good luck, *see* J.A. 157, along with intense human effort—including extensive habitat restoration. J.A. 161-62.

Nor is there dispute as to what is necessary to halt and reverse the species' perilous state: The establishment of additional breeding populations. "Recovery of the dusky gopher frog will not be possible" without that. J.A. 125. And no one, including petitioner, disputes what that requires: Open-canopied, ephemeral ponds—supportive of metapopulations, J.A. 157-58, outside Mississippi, but within the species' historical range—are "absolutely necessary," J.A. 39 (Richter), both to stave off catastrophic near-term harm and put the species in position to recover. J.A. 125-26.

The Service designated Unit 1 as critical habitat because it directly and uniquely responds to these

needs: Its five intact ponds provide breeding habitat superior to any of the Mississippi sites. J.A. 125-26. It is within the historic range, but far enough from Mississippi to hedge against stochastic events. *Id.*[7]

In designating, neither the Service nor the independent outside reviewers succumbed to the "more is better" thinking and pond-focused tunnel vision petitioner would impute to them. The same scientists and decisionmakers who recognized Unit 1 as essential concluded that none of the more than 60 ponded areas considered in the Alabama historic range should be designated, based, in some instances, on the condition of their surrounding areas. J.A. 127-28, 159. And when the leading expert on the species concluded that Unit 1 is "the best gopher frog habitat remaining in Louisiana," J.A. 53 (Pechmann), he did not believe it was turn-key ready or optimal in all respects. Rather, he and others recognized that the basics were present and that Unit 1 was, in their judgment and based on experience in Mississippi areas, restorable. J.A. 167.

3. For its part, petitioner has never claimed that any *other* area is better or comparably suited to the

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[7] The landowner parties treat this virtue as a vice, arguing that Unit 1 cannot be critical habitat because it is not adjacent to an occupied area—not close enough that a Glen's Pond frog could "reach Unit 1 on its own." Markle Br. 11. In some instances, adjacency makes an unoccupied area essential—for instance, where it contributes sediments needed to support an endangered downstream fish population, *see Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015). But the conservation needs of this species make *non*-adjacency critical. As for the commute, the Act does not contemplate species' conserving themselves. Among the "methods" it enumerates are "propagation, live trapping, and transplantation." 16 U.S.C. § 1532(3).

species' conservation needs. Nor has it contested the factual and scientific findings underlying the designation. In the court of appeals, petitioner expressly endorsed the Service's findings about the physical characteristics and biology of the breeding habitat on Unit 1. C.A. Br. 36. Indeed, petitioner did not deny that "it is easier to restore terrestrial habitat than to restore or create breeding ponds." *Id.* And petitioner has not heretofore disputed the sobering reality that extinction is an ever-present risk for this species—and a much higher one were conservation to be pursued only on the sites designated in Mississippi.

To the extent petitioner attempts now to walk away from these conceded scientific realities, it hardly advances its cause. First, any implication that the species' plight is significantly less dire than the 2012 rule described, *see* Petr. Br. 15, 39, 44, is folly. The source from which petitioner extracts its snippets of upbeat news ultimately concludes there is no realistic prospect of the frog's achieving even "threatened" status in the foreseeable future, 5-Year Review at 5—and that extinction is still a likely prognosis. *Id.* at 3, 21. Still more misconceived is petitioner's attempt to minimize the biological significance of isolated ephemeral ponds. True, dusky gopher frogs spend only "8 to 17" days of the year in them. Petr. Br. 24. But no herpetology expertise is needed to see the fault in this logic: From a species-survival perspective, *breeding* is an especially important process. That a person spent only 6,720 hours *in utero*, as opposed to 110,000 lifetime hours watching television (as the average

American is estimated to), is hardly evidence of secondary importance.[8]

B. Unit 1 is no less "essential" because its current state needs work before its full conservation value, as a future translocation site, can be realized.

Rather than claim that Unit 1 is inessential in the ordinary sense of the term—*i.e.*, that the need is not great or there is some alternative way of advancing the species' conservation—petitioner argues that "the best gopher frog habitat," J.A. 53 (Pechmann), is disqualified because it is not *good enough*. That argument invites the Court to conflate two propositions—(1) that an area that is *lethal* to a species cannot be "essential for [its] conservation" and (2) that an area that is imperfect, but restorable, cannot be. The first is irrelevant to this case. The second is plainly contrary to the statute.

1. Petitioner's attention-grabbing assertions that Unit 1 is unlivable in some absolute sense—the way a "desert" could not be unoccupied critical habitat for "a fish"—should not distract the Court. Pet. 18 (quoting Am. Br. Ala. et al., in Support of Rh'g En Banc 3).

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[8] Nor does the news about other ponds warrant petitioner's enthusiastic account: The source petitioner cites estimates that Glen's Pond accounted for 135 of the 160 adult frogs living in the wild in 2015, 5-Year Review at 8-9, and breeding events at the others have been in single digits or zero in most years. *See id.* (breeding at Mike's Pond occurred in four of 11 years; no frogs heard at McCoy's Pond since 2004). Experience similarly refutes the suggestion that the problem of artificial ponds has been solved. Efforts to engineer such ponds have been ongoing since 2002 yet have not produced a single stable breeding population.

a. To begin, actual experience in Mississippi rules out any suggestion that a frog "would immediately die if moved [to Unit 1]." *Id.* When the dusky gopher frog population was discovered on Glen's Pond in the 1980s, the surrounding area was under active timber management, which included clear-cutting and fire suppression. *See* 66 Fed. Reg. 62,993, 62,997 (Dec. 4, 2001). The frog's "continued occurrence" under these conditions led the Service to conclude (long before Unit 1 was in dispute) that "[t]imber management that avoids adverse effects to important habitat characteristics *is compatible with* maintenance of the [dusky] gopher frog." *Id.* (emphasis added).

b. Nor is the analogy to Glen's Pond required. It is a fact that, for at least six decades in the twentieth century, the dusky gopher frog persisted on Unit 1 itself, notwithstanding ongoing commercial harvesting of loblolly pine, including for twelve years under the timber lease that petitioner holds. *See* AR5812. No "fish in the desert" would survive for twenty generations. (Indeed, it is not certain that the species was gone even in 1965; before 1987, the frog had for years evaded observation in Mississippi, despite dogged efforts to locate it there.)[9]

c. The fact that the frog survived at both sites attests to the hazards of the kind of casual and unscientific claims about particular habitat elements

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[9] The Louisiana Department of Wildlife and Fisheries has designated the species a state endangered species and classified it as "SH," meaning "possibly still persisting"—in St. Tammany Parish—rather than "SX," "believed to be extirpated from Louisiana." *See Species by Parish List* https://tinyurl.com/ybxcm93q.

on which petitioner's claims depend. Both oxygen and pomegranate juice can be described as life-sustaining, but that does not mean one should fret about going without the latter for five or ten minutes. So too for the frog. Open-canopied uplands—unlike open-canopied ponds, J.A. 151—appear not to be a life-or-death matter.[10] Likewise, while long-leaf pine forests are the species' historic habitat and "preferabl[e]" to other pine species, J.A. 155, there is no basis for suggesting that loblolly pines are in themselves lethal. Nor, of course, is "fire-suppression" an inhospitable *physical feature* of an area. It is a human intervention—one that, by definition, is undertaken where fire would otherwise be *present*. And unlike with paving over of an ephemeral pond, degradation from past fire suppression can be reversed through prescribed burning.[11]

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[10] Because relatively little is yet known about the dusky gopher frog—and what is known derives from studying the single Glen's Pond population, J.A. 151, the Service's final rule relied heavily on studies of a closely related species, *Rana capito*. J.A. 109. That species has been documented on ponds whose surrounding uplands include fire-suppressed, closed-canopy pines. *See, e.g.*, AR1412 (Elizabeth A. Roznik & Steve A. Johnson, *Burrow Use and Survival of Newly Metamorphosed Gopher Frogs* (Rana capito), 43 J. Herpetology 431 (2009)). While juveniles in that study were found to *prefer* open-canopied areas, those who migrated to areas containing closed-canopy pine uplands not only survived, but survived at higher rates than juveniles migrating to one fire-maintained area—a result the researchers suggested might be attributed to the frogs' predators *also* preferring open-canopied habitat. *Id.* at 434-36.

[11] While petitioner raises the specter of "frequent fire[]," Petr. Br. 16 n.10, prescribed burning is a management tool, which achieves the soil-enhancing and other benefits of wildfires while avoiding the perils. It has been practiced in the DeSoto National

2. Once the dense thicket of imprecision and embellishment is cleared away, the dispositive legal question comes into focus: Did Congress, in *requiring* the Secretary to designate unoccupied areas that are "essential" thereby *prohibit* designating areas that are flawed, but restorable? The plain text of Section 3(5)(A) and the thrust of numerous other provisions foreclose any such suggestion.

a. As a matter of ordinary understanding, whether something is optimal and whether it is essential are different matters. Indeed, the suboptimal is commonly accepted *because* it is essential. In the face of urgent necessity, the least-imperfect alternative is chosen, lest the "best [be] an enemy of the good." *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009); *id.* (declining to vacate a rule held to be legally inadequate, lest the court "sacrifice such protection as [the rule] now provides"). In the event of major natural disasters, people are re-located to travel trailers and even sports arenas. *Cf. In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, 668 F.3d 281, 289-90 (5th Cir. 2012).[12]

b. Congress surely did not intend for the perfect to defeat the good in *the Endangered Species Act*. In light of the specific judgments codified in "every section of

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Forest for decades, without adverse effects on silviculture or residential occupation, at a "frequen[cy]" of approximately once every four years. AR000892.

[12] Indeed, petitioner's litigating stance is predicated on the notion that certain features of the parcel, including its highway proximity and elevation—given that "hurricanes" and "flooding" are "inevitable," Petr. Br. 33—make it well suited for residential occupancy, notwithstanding the current absence of infrastructure and presence of dense loblolly pine.

the statute," *Hill*, 437 U.S. at 184, it is unimaginable that Congress, through enactment of the word "essential"—or any other, *see* Part III, *infra*—required that the Service, if faced with a choice between designating a promising, restorable unoccupied area and relegating an ebbing species to its manifestly inadequate, curtailed range, take the latter course.

On the contrary, multiple provisions of the Act establish the opposite: that currently imperfect, restorable habitat is integral to the program that Congress designed. First, species extinction is not just another consideration under the statute; it is a harm that must be resisted "whatever the cost," *Hill*, 437 U.S. at 184, making it implausible that Congress would prohibit designating less-than-perfect areas in circumstances like this.[13]

Second, Congress made explicit that "conservation," a constituent term in the Section 3(5)(A)(ii) "critical habitat" definition, means use of "all methods and procedures" necessary for recovery, including a lengthy but non-exhaustive list of such active interventions. *See* 16 U.S.C. § 1532(3). That is the opposite of directing the federal government simply to take a hands-off approach to pristine, optimal areas. This directive, in turn, comports with the recognition, at the heart of the Section 7 consultation regime, that many endangered species are not found in pure wilderness, making careful

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[13] In the 1978 amendments, Congress took a modest step away from this literally unqualified mandate. But its chosen mechanism, the cabinet-level committee, *see* 16 U.S.C. § 1536(e), has only twice used its authority to approve federal action found likely to jeopardize a species.

accommodations of conservation and other values imperative.

Third, the text of the definition addressing *occupied* areas further belies the premise that Congress meant to limit the critical habitat efforts to only the very best land. That provision's conjunctive language directs the Service's focus to areas with valuable "physical biological features" which *also* require "special management considerations." 16 U.S.C. § 1532(5)(A)(i).

3. Petitioner attempts to deploy the two-part definition in an entirely different way. *See* Petr. Br. 27-28. It proposes that the Court (1) read the occupied areas language as requiring that each "specific area[]" currently contain all biologically important features and (2) then read the unoccupied areas definition as if it says: "*In addition to the requirements of Section 3(5)(A)(i)*, [the] specific areas outside the geographical area occupied by the species . . . [must be] essential for the conservation of the species," such that the absence of any single feature precludes designation.

That is wrong. Congress often writes statutes that way. *See, e.g.*, 22 U.S.C. § 6065(b) (identifying factors "[i]n addition to the requirements in subsection (a) of this section" that must be "take[n] into account"). But it did not do that here. Instead, Congress enacted the two-part definition using distinctly different substantive language in the two adjacent sentences.

There is nothing "perverse," Petr. Br. 35, about reading the definition—both components—in accord with Congress's chosen language. In fact, the two parts respond to two different situations. In its first part, Section 3(5)(A)(i) principally addresses, for species *with* sufficient useful habitat at the time of

listing (for example, ones whose endangerment resulted from hunting), how to determine *which* areas to designate as critical. *See also* 16 U.S.C. § 1532(5)(C). In the second, Congress primarily addressed species whose *entire* current range would still not be sufficient to support their conservation. *See id.* § 1532(5)(A)(ii).

In any event, petitioner's argument proceeds from two erroneous premises. First, Section 3(5)(A)(i) is not plausibly read as requiring that each "specific area" contain *every* essential feature. A migratory bird may nest in one place and feed in another; an anadromous fish spawns in fresh water and matures in the ocean—but no one would say that suitable habitat must contain both fresh and saltwater. *See Home Builders Ass'n v. U.S. Fish & Wildlife Serv*, 616 F.3d 983, 988 (9th Cir. 2010) ("In vernal pool complexes, the elements necessary to species survival are present in distinct areas.").[14]

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[14] Petitioner's effort to impose an all-features requirement via the regulatory "PCEs" rather than the statute, fares no better. As noted above, the agency subsequently jettisoned the PCE concept entirely. *See* n.3, *supra*. But even under the 2012 regulations, the presence of all PCEs was not a requirement. Those regulations said the Service would "*focus on* the principal biological or physical constituent elements within the defined area." 50 C.F.R. § 424.12 (2012) (emphasis added).

Accordingly, it was the Service's longstanding practice to designate areas based on biological realities, whether or not all features or PCEs are currently present. *See, e.g.*, 73 Fed. Reg. 45,534, 45,558 (Aug. 5, 2008) (explaining that "some [designated] units contain only a portion of these PCEs"); 77 Fed. Reg. 71,876, 71,917 (Dec. 4, 2012) (designating areas that are "capable of developing the PCEs . . . that will be necessary for population growth").

Second, the statutory text nowhere directs that the standard for designating unoccupied areas must be more demanding than the occupied areas test—let alone that it be a more demanding *version* of the same test. *See* Petr. Br. 27. Rather, it stands to reason that Congress would have expected unoccupied areas to require *more* restoration than ones where the species currently lives. In any event, the statutory definition focuses on the *need* any specific area could serve, not its abstract quality.

Unoccupied area designations are rarer, *as a descriptive matter*. But that surely reflects the biological reality that a species' currently occupied areas will, in most circumstances, be a better conservation bet than an area it does not currently occupy. But that is not invariably true—and not a statutory command. If, for example, the Service were deciding whether to designate a military base on which a species is currently found or a larger low-traffic area it occupied until recently, the best science might counsel designating the latter. Indeed, the Service's 2016 regulatory revision acknowledged that the "rigid step-wise" approach followed here—where unoccupied habitat could only be considered after determining that occupied areas were inadequate—will not always be the most efficient approach or "the best conservation strategy for the species." 81 Fed. Reg. 7,414, 7,426-27 (Feb. 11, 2016).

4. This textually proper and biologically sensible understanding is on all fours with the designation of critical habitat, both occupied and unoccupied, for the dusky gopher frog in Mississippi. The Service "identified 15 ponds and associated forested uplands that [it] considered to have *restoration potential*."

76 Fed. Reg. 59,774, 59,775 (Sept. 27, 2011) (emphasis added). To the extent such areas had "all of the PCEs" at final designation, J.A. 154, that was the result of active efforts in areas that were not remotely move-in ready at the time of listing or even of initial designation. *Cf.* 75 Fed. Reg. 31,387, 31,394 (June 3, 2010) (noting that proposed Mississippi areas had "at least one of the PCEs" due to "[h]abitat restoration efforts").

Nor, lest petitioner argue otherwise, does this imply that the Act requires that all restoration be complete before designation. Not even Dr. Pangloss would say that it is *too early* for intervening in the dusky gopher frog's plight. And given the ongoing threats to habitat—and sometime irreversible character of degradation—a "wait and see" approach is biologically and statutorily irresponsible. Indeed, that is the *actual* import of Section 4(a)(3) of the Act. *See* pp. 42-49, *infra*. Recognizing Unit 1 sooner rather than later avoids actions that would unknowingly squander the area's singular conservation value and enables those concerned for the species' well-being to explore solutions that both respect "the timber management goals of the landowners and work toward[] recovery of the dusky gopher frog." J.A. 123.

C. Neither does Unit 1's private ownership mean it is not essential under the Act.

This leaves the argument that Unit 1 is inessential, not because the frog cannot live there, but rather because the owners will not let it. *See* Petr. Br. 28-29. On this reasoning, even if Unit 1 were ideal—and the last place on earth to salvage *R. sevosa* from imminent extinction—the landowners' right to exclude would in itself prohibit critical habitat designation.

As a matter of statutory text and common sense, that is untenable. Had Congress meant to restrict designations, it could have so provided. Congress plainly knows how to create an exclusion for private owners. *See, e.g.*, 54 U.S.C. § 302105(b) ("If the owner of any privately owned property . . . object[s] to . . . designation [as a National Historic Landmark], the property shall not be [designated].").

Nothing in the critical habitat provisions supports such a distinction. Ownership is not a "physical or biological feature[]" of a parcel of land, 16 U.S.C. § 1532(5)(A)(i), and whether a "specific area" is "essential for the conservation of [a] species," *id.* § 1532(5)(A)(ii), is a matter of science, not property law. Indeed, the Act could not accomplish its aim of halting extinctions were critical habitat restricted to areas owned by the federal government and private volunteers. "[A]t least 80 percent of endangered or threatened species occur either partially or solely on private lands," and "50 percent of federally listed species are not known to occur on Federal lands at all." 71 Fed. Reg. 60,238, 60,244 (Oct. 12, 2006).

In declining to draw the line petitioner seeks, Congress also rejected petitioner's underlying premise: that species conservation and private ownership are fundamentally incompatible. First, though a critical habitat designation has no effect on ownership rights, it provides immediate protection against heedless *federal* activities that might otherwise compromise Unit 1's irreplaceable ecological resources. Absent designation, the Federal Highway Administration might not think twice before financing a road-building project that paved over what appear to be a handful of unprepossessing ephemeral ponds.

Such informational benefits are, in fact, of special importance in unoccupied habitat designations, where the area's value to species conservation is almost never self-evident. And these informational benefits extend to conservationists and state and local officials who might provide financial and technical assistance aimed at preventing avoidable degradation. Indeed, such information is of value even to a hard-nosed property owner, who might want to keep open its options for monetizing the ecological value.

If, as explained above, the landowners were to pursue residential development—and were such a project to require a Clean Water Act Permit and were that permit to trigger a Section 7 consultation—there is every reason to expect that the developer's objectives and Congress's species-conservation commitment could both be realized. That is what happened with *this* species in Mississippi: A large centrally planned residential community was developed immediately adjacent to Glen's Pond, *see* AR4574, 4582, after the dusky gopher frog was proposed for listing. The Service concluded that the species would not be jeopardized, provided that a narrow strip of land next to the pond went undeveloped. *Id.* What happened on Unit 2 could happen on Unit 1. As that experience attests, conservation is viewed as a positive amenity by many home-buyers. And many federal, state, and nongovernmental resources support owners' conservation efforts. *See, e.g.*, U.S. Fish & Wildlife Serv., *Grants Overview*, https://tinyurl.com/y6wzjcbh; La. Dep't Wildlife & Fisheries, *State Wildlife Grants Program*, https://tinyurl.com/ycwm8ptj.

And even were the landowners' plans to fall into the vanishingly small class of proposed actions that are found to be irreconcilable with conservation, private conservation groups commonly seek out critical habitat to purchase at market prices, often with funds from other parties needing environmental mitigation credits. *See* Nature Conservancy, *Mississippi, Old Fort Bayou Mitigation Bank*, https://tinyurl.com/ydghsem5.

Finally, were no private party to come forward in such circumstances, federal acquisition—either by voluntary purchase, *see* 16 U.S.C. § 1534, or eminent domain, *see* 40 U.S.C. § 3113—would, as petitioner points out, be an option.[15] But as petitioner must concede, Congress did not make federal purchase a precondition to critical habitat designation. And, for the reasons just discussed and others, Congress has treated direct federal ownership as a last resort, not a first. It seldom will be necessary to purchase an entire area to obtain the needed benefits for the species, and local governments and communities usually prefer that, when possible, private, revenue-generating activity and conservation both occur.

III. Section 4(a)(3) directs designation of critical habitat, without altering its definition.

Before the court below, petitioner forthrightly recognized that the lawfulness of the Unit 1

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[15] Contrary to petitioner's assertion, Petr. Br. 42, the Act does not expressly address eminent domain; the "regulated taking" that 16 U.S.C. § 1532(3) refers to is the taking *of a species*—"in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved," *id.* Petitioner is correct that the federal government's general authority includes acquiring land for species conservation purposes.

designation is controlled by what Congress said "[t]he term 'critical habitat' . . . means." 16 U.S.C. § 1532(5)(A). *See* C.A. Br. 27, 33-36. So did the other parties and both the majority and dissenting opinions. *See, e.g.*, Pet. App. 65a (Owen, J., dissenting) ("The touchstone chosen by Congress was 'essential.'").

In this Court, petitioner argues that the Section 3 definition is only part of what the Act requires. An unoccupied area that is "essential for the conservation of the species" *may not* be designated, petitioner now contends, unless it *also* satisfies a separate requirement, imposed under Section 4(a)(3). *See* Petr. Br. 22-24. By using the phrase "any habitat . . . considered to be critical habitat" in that provision, the argument continues, Congress directed that an unoccupied area must also be "a subset" of "habitat" *id.* 22, 31, which petitioner says connotes "habitability," *id.* 25, which, it further assures the Court, means the current occurrence of every "PCE," *id.* 27. In this fashion, petitioner says, Congress "directly spoke[] to the precise question at issue [here]"—and clearly prohibited the Service from designating historical habitat that is restorable and urgently needed for species recovery. *Id.* 22 (quoting *Digital Realty Trust v. Somers*, 138 S. Ct. 767, 781-82 (2018)).

Initial consideration of this new line of argument discloses a number of significant embarrassments. And "close analysis," Petr. Br. 18, under the canonical rules for interpreting statutory text, confirms that petitioner has not struck gold, but pyrite.

1. The first—and not least—of these difficulties is utter incompatibility with the substantive judgments codified throughout the Act. As explained above, *see*

pp. 32-34, *supra*, it is not very plausible that Congress, focused on habitat curtailment, and determined to reverse species loss, "whatever the cost," would nonetheless draw the line at desperately-needed areas the Service determines to be "critical habitat," unless they also met some further requirement.

Moreover, this argument must reckon with the reality that the ostensibly "plain" "clear," "direct[]" "command," *see* Petr. Br. 4, 18, 22, 31, eluded not only the courts below, but petitioner itself. This is no mere case of failing to take note of an obscure provision in a sprawling statute. Petitioner's opening and reply briefs below discussed and even *quoted* Section 4(a)(3)—but both took the trouble to *substitute* the word "land" for "habitat." Thus, petitioner described Section 4(a)(3) as "authoriz[ing] the Service to designate *land* 'which is then considered to be critical habitat.'" C.A. Br. 38 (emphasis added); *see also* C.A. Reply Br. 11 (similar).

Even that is not all. Citations and quotations aside, petitioner advanced an interpretation of what critical habitat means that is irreconcilable with what petitioner now insists the Act plainly says. Seeking to persuade the Fifth Circuit of the lawfulness of the Service's designation of a sediment-rich, but uninhabited—and uninhabitable—area as "critical habitat" for the Santa Ana sucker, petitioner represented that Congress *did not* prohibit designating "land that is unsuitable as habitat." C.A. Br. 28-29. And, petitioner further explained, it *"is not* strictly necessary" under the Act that "every [unoccupied] area designated as critical habitat

contain all essential habitat elements." *Id.* (emphasis added).[16]

2. The truly fatal problems, however, for petitioner's (revisionist) reading of Section 4(a)(3), derive from the text of the provision and its "place in the overall statutory scheme," *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

Section 4(a)(3) is a "command," Petr. Br. 3, to be sure, but the "precise question" it directly addresses, *id.* 22, is *when* to designate areas "considered to be critical habitat." And its command is to do that promptly, *i.e.*, "concurrently with" listing, not at some later date, a directive reinforced with words like "shall" and "maximum" and "any." Indeed, the scores of decisions construing the much-litigated provision have all understood that to be provision's domain. Respondent-intervenor Center for Biological Diversity, having been party or counsel in many such cases, is aware of no decision that has even hinted that Section 4(a)(3) also contains a *negative* command, housed in an occult meaning of "habitat," that substantively restricts *which* areas the Service shall designate.

3. And petitioner's theory takes no account of *Section 3(5)(A)'s* place in the overall statutory scheme. A Congress intent on prescribing *what* areas, occupied or unoccupied, the Service should and may not designate "critical habitat" would do so through a

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[16] When that designation was litigated, the Ninth Circuit echoed petitioner's Fifth Circuit position, finding "no support" "in the text of the ESA or the implementing regulation," for requiring that an area that is essential also be "habitable." *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015), cert. denied, 136 S. Ct. 799 (2016).

provision settling what "critical habitat "means" for purposes of the Act. That is what Congress *did* do, in the same 1978 legislation that also enacted Section 4(a)(3). A legislature known for not "hid[ing] elephants in mouseholes" would not, while debating and ultimately codifying a statutory definition, tuck a distinct limitation in a provision commanding that the Service speed up critical designations. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).[17]

4. If the 95th Congress *had* in fact harbored the specific restrictive intent for Section 4(a)(3) that petitioner claims for it, it would have made no sense to express its all-PCEs-now requirement by simply dropping the word "*habitat*," undefined, into Section 4(a)(3), and then counting on the Service to glean its restrictive meaning. As petitioner's brief and many others attest, "habitat" is "a word of many, too many, meanings," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998), to function as a term of limitation.

Within the Act itself, the word is used variously—in ways inconsistent with one another and with the highly particular understanding petitioner says is "the" meaning. Section 8a(e)(2)(B), for example, requires international cooperation in identifying "habitats upon which [migratory birds] depend." 16 U.S.C. § 1537a(e)(2)(B). A stopover along a migration

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[17] Tellingly, although petitioner places heavy reliance on individual floor statements and other arcana from the Act's legislative history to make the case that "Congress" did not intend expansive designations, see Petr. Br. 31-32, these chosen snippets invariably refer to *Section 3(5)(A)—i.e.*, the "definition," Leg. Hist. 1121 (Rep. Murphy) (quoted in Petr. Br. 32). None addresses Section 4(a)(3), let alone alludes to the independent restrictive intent petitioner now claims for that provision.

route rarely contains all characteristics required to sustain the totality of a bird's life-history processes. But such areas constitute "habitat" under the Act—and indeed, regularly are designated critical habitat. *See* p. 35, *supra*; *cf. Ariz. Cattle Growers Ass'n*, 606 F.3d 1160, 1165-66 (9th Cir. 2010) (explaining that equating "occupied habitat" with areas where a species resides "would make little sense as applied to nonterritorial, mobile, or migratory animals").

And as discussed, the listing provision, Section 4(a)(1)—which is Section 4(a)(3)'s close neighbor—references "present" "destruction, modification, or curtailment" of an endangered species' "habitat." 16 U.S.C. § 1533(a)(1). This statutory recognition of "habitat" of a species that is "modif[ied]" at "present" is at sharp odds with the notion that the word "habitat" of its own force excludes areas needing restoration.

Most conspicuously, in Section 3(5)(A)(ii), Congress departed from what likely is the most familiar meaning of the word, when it provided that "critical habitat" is *not*, for purposes of the Act, limited to the "place[s] where [the] particular species of animal or plant is normally found," *Habitat*, Black's Law Dictionary (10th ed. 2014), but instead includes places "outside the geographical area occupied [in even a broad sense] by the species." 16 U.S.C. § 1332(5)(A)(ii).

Petitioner, recognizing this incompatibility, simply omits that dictionary definition from its brief, *compare* Pet. App. 134a (Jones, J., dissenting), but the damage

to its "ordinary meaning" claim is not so easily cordoned off.[18]

5. Indeed, petitioner's "subset" theory, *see* Petr. Br. 31, derives its plausibility from reading the Act as if the express definitional provision did not exist. If Congress had enacted a provision directing the Service to make grants, promptly, to "such states that are considered to be participating states," it would be reasonable enough to argue that Guam was not a "state" and thereby ineligible. But if Congress had contemporaneously enacted *another* provision defining "participating states" to include "territories of the United States," it would be unnatural to conclude Guam was excluded, on the ground that "Congress required *both*," *see* Petr. Br. 22, that a grantee be a "participating state" and that it satisfy the "ordinary meaning" of "state."

6. But petitioner's theory is not merely far-fetched. It is wrong and, if adopted, would subvert the important work that Section 4(a)(3) actually was enacted to accomplish.

a. Petitioner cannot dispute that the definition of "the term 'critical habitat'" was enacted to clarify the predicate for Section 7 consultations—federal actions modifying "habitat of [endangered] species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2). The full equivalence of the two terms was widely recognized soon after the statute's

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[18] The definitions that petitioner does include reinforce how diversely and broadly the term is used. *Compare* Petr. Br. 24 ("[T]he place or type of site where an organism or population naturally occurs"), *with id.* (an area containing "physical and biologic factors which provide at least minimal conditions for one organism to live").

enactment. *See, e.g.*, *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976) (explaining that Section 7 "imposes on federal agencies the mandatory duty to insure that their actions will not . . . destroy or modify *critical habitat* of an endangered species") (emphasis added); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1301 n.37 (8th Cir. 1976) (same). In fact, their equivalence was established *before* enactment. *See* H.R. Rep. No. 93-412, at 14 (1973) (describing "destruction of critical habitat of those species").

This Court's decision in *Hill* used the Section 7 language and "critical habitat" fully interchangeably. In fact, the Court said that "the Act does not define 'critical habitat,'" but added that "the term"—by which it meant the Section 7(a)(2) phrase—had been "administratively construed." 437 U.S. at 160 n.9.[19] So

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[19] Petitioner goes wholly off the rails when it suggests that the Court's opinion in *Hill*, by using the word "habitat," somehow announced petitioner's restrictive meaning. Petr. Br. 30. Nothing in that case turned on the meaning of "critical habitat," let alone unoccupied critical habitat; completing the dam project would have destroyed the species in the only place it was known to live. To the extent the Court addressed the meaning of "critical habitat," it quoted—with approval—the "administrative definition" that, on petitioner's telling, Congress later disapproved. *See* Petr. Br. 8-9.

But petitioner gets the enactment history wrong also. Although Congress responded to *Hill*'s substantive holding (and apparently was concerned by the regulation's potential application in *occupied* areas, *see* 16 U.S.C. § 1532(5)(C)), the *unoccupied* habitat component of the statutory definition is *broader* than was the regulatory one—which referenced only "additional areas for reasonable population expansion," 43 Fed. Reg. 874, 875 (Jan. 4, 1978), and arguably looked only to species' "survival," rather than "conservation." *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441 (5th Cir. 2001) ("'Conservation' is a much broader concept.").

when Congress settled what "'critical habitat' . . . means" it assuredly contemplated the areas for which Section 7 consultations would be required.

b. Against this background, the burden of petitioner's argument is that Congress intended the phrases "*habitat* . . . considered to be *critical habitat*" in Section 4(a)(3) and "*habitat* determined . . . to be *critical*" in Section 7(a)(2) to mean different things. As a descriptive matter, that is unlikely: What surely happened is that Congress, having answered in Section 3 what the Section 7 phrase meant, did not take the trouble to re-write *that* provision's language; but, in drafting the new concurrent designation directive, it picked up the newly minted statutory term.

c. If credited, petitioner's "surplusage" argument would wreak substantive mischief, because the areas for which Section 7 consultations are required would then be different from those the Secretary must designate under Section 4. *That* regime would defeat a principal, actual reason for Section 4(a)(3)'s enactment: to ensure that critical habitat is identified early and rigorously, well before any potentially incompatible federal project gets too far along.

7. In reality, the meaning of "*habitat* considered to be . . ." is clear from the context—it is not surplusage. Rather, that statutory word is "given effect," Petr. Br. 23—its intended, albeit innocuous, effect—by construing it as a synonym for "land" (or for the term "area" in Section 3(5)(A)). That is how petitioner understood the word when it substituted "land" for "habitat" in describing Section 4(a)(3)'s operation to the court below. *See* C.A. Br. 38. There is no "canon of interpretation that forbids interpreting different

words used in different parts of the same statute to mean roughly the same thing." *Jennings v. Rodriguez*, 138 S. Ct. 830, 845-46 (2018) (citation omitted).

IV. Petitioner's non-textual arguments for narrowing the statute also fail.

With no credible foothold for its desired requirement in the statute Congress enacted, petitioner devotes much ink to asking this Court to impose one anyway, lest the absence of a "limiting principle" allow designating critical tropical bird habitat in Alaska and the like. *See* Petr. Br. 37. The judiciary has no free-floating power to "improve upon" the statutes Congress enacts, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014). But if it did, there would be no warrant for its exercise here. "[L]ike most apocalyptic warnings, [petitioner's] proves a false alarm." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). Nor does constitutional avoidance do the trick.

A. There is no policy justification for restraining the designation process Congress established.

Petitioner's supposition that the process needs reining in mistakes the fundamentals of the Act's design and real-world operation.

1. When the Service promulgated a regulation, designating Unit 1 (and other areas) as critical habitat, it was not announcing a general "one-feature-suffices" rule for designations going forward, such that a yard with an "[i]ndividual tree[]" might be next up. Petr. Br. 38 (quoting Pet. App. 155a-56a). The agency was concluding, based on the scientific data, that *these* areas are essential for the conservation of *this* species.

That is, by statute, how every designation occurs—species-by-species, area-by-area, with rigorous, independent input and maximal rights of participation for interested parties. (This rule was the culmination of three rounds of notice and comment, a public hearing, and an economic analysis.)

Of course, designations *are* constrained, by the requirements Congress specified: An unoccupied area may be designated critical habitat *only* if it is, as a matter of scientific judgment, "essential for the conservation of [a] species." 16 U.S.C. §§ 1532(5)(A)(ii), 1533(b)(2). A fair application of that standard would plainly rule out the hypothetical—and entirely fanciful—designations petitioner would have the Court worry over. No all-PCEs-right-away restriction is required to prevent the Service from proposing to "raze[] a "cit[y]," Petr. Br. 37; and if any such critical habitat were ever proposed, no peer reviewer—or reviewing court—would sign off. In this case, for instance, the Service was (eventually) persuaded of the great value of additional breeding sites within the species' historic range but outside of Mississippi. But even that (correct) understanding, in conjunction with the agency's supposedly exaggerated focus on ponds, did not prevent it and its scientists from refusing designation of the more than 60 ponded areas it identified within the frog's historic Alabama range. J.A. 159.

2. Petitioner's narrative of agency overreach loses plausibility when considered in light of the critical habitat program's actual administration over the past four decades. Notwithstanding the statutory concurrent designation mandate, critical habitat designations have lagged far behind listings. *See* Tara

G. Martin, *Timing of Protection of Critical Habitat Matters*, 10(3), Conservation Letters 308-16 (2017). And courts have repeatedly faulted the Service for impermissibly narrow understanding of its responsibilities. *See, e.g.*, *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004). And this administrative reticence is by all accounts linked to "constant political pressure [from] the congressional authorization and appropriations processes" in this area. Antonin Scalia, *Responsibilities of Regulatory Agencies under Environmental Laws*, 24 Hous. L. Rev. 97, 107 (1987). *See, e.g.*, *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1182-84 (10th Cir. 1999) (describing appropriation riders restricting, and in some instances prohibiting, critical habitat designations).

B. The Service's exercise of its designation responsibility raises no serious constitutional question.

Nor, contrary to petitioner' contention, is "constitutional avoidance" an available means for grafting its desired restriction onto the statute. *See* Petr. Br. 32-35. Petitioner seeks to deploy that doctrine in novel fashion, unmoored from its origins in principles of judicial restraint. But even under the standard rules, which require both a "gravely [doubtful]" constitutional question, *Almendarez-Torres v. United States*, 523 U.S. 224, 239 (1998), *and* a "plausible statutory interpretation[]," *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018), it could not succeed.

1. There is no constitutional question here, serious or otherwise. The Service did not, through

designation, assert "jurisdiction over the land and water in Unit 1." Markle Br. 37. Indeed, Section 4(a)(3) does nothing in itself—it simply places an area on a list in the Federal Register. The only operative provision triggered is Section 7, which regulates only federal actors. *See* 16 U.S.C. § 1536(a)(2) (addressing "any action" of "[e]ach Federal agency"). Because Congress needs no special grant of authority to regulate the federal government or impose limits on federal activities it has authorized, *see Gonzales v. O Centro Espirita Beneficente U.D.V.*, 546 U.S. 418, 424 n.1 (2006), there is no Commerce Clause issue to avoid.

And the courts of appeals are in any event unanimous that Section 9 of the Act, which directly regulates private party actions (including adverse habitat modification) on private lands, is within the Commerce Power, including when applied to "intrastate, non-commercial species." *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 641 (5th Cir. 2003). *See generally People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1002, 1007 (10th Cir. 2017) (collecting decisions), *cert. denied*, 138 S. Ct. 649 (2018).

2. This case differs from ones where the avoidance canon is usually applied, in that the supposed constitutional problems the plain-language construction produces did not induce petitioner to present them to this Court, despite having maintained throughout that the designation was unconstitutional. Whether this deliberate choice to keep actual constitutional claims from the Court should render "avoidance" arguments inoperative, it at least raises an inference that petitioner adjudged these "constitutional" issues of greater value as a spectral

presence in this case than as an actual one. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("[L]awfulness under the Constitution is a separate question to be addressed in a constitutional challenge.").

Finally, if there were any constitutional significance to whether an endangered species is "intrastate," that distinction should not benefit petitioner's constitutional (or semi-constitutional) arguments here. Until the relatively recent past, the dusky gopher frog was not "an intrastate species," Markle Br. 37, but a multi-state one. It seems most implausible that 1965 was a fateful year not just for Louisiana frogs but for Congress, too—that its authority to enact protective legislation would wither once habitat curtailment has pushed a species to a single state.

V. There is no basis for setting aside the critical habitat designation on economic grounds.

For all the overwrought claims of judicial "abdicat[ion]," Petr. Br. 45, petitioner's second question presented is not really about "reviewability" in the abstract. It is instead about the particular *kind* of judicial review that petitioner seeks. Congress did not authorize courts to overturn critical habitat *designations* on economic grounds. And the decision here construed the Act properly—to deny petitioner's effort to raise at the (non-exclusion) back door a claim that Congress forbade it to press at the front.

1. For all the unreviewability talk, petitioner recognizes, the "decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include*" it. Petr. Br. 49 (quoting Pet. App. 160a n.21 (Jones, J.,

dissenting)). And *that* decision is fully reviewable under the Administrative Procedure Act; indeed, this Court is the third to consider petitioner's claims that the Unit 1 designation exceeded statutory bounds or was arbitrary and capricious. (And were there any claim that the Service did not rely on the best science or take account of economic impacts, those claims would be cognizable too. *See Bennett v. Spear*, 520 U.S. 154 (1997).) But this Court made clear from the inception of the Act that a reviewing court *may not* entertain a claim to set aside a lawful critical habitat designation on cost grounds. In *Hill*, the Court highlighted the "obvious[] . . . difficult[y] for a court to balance the loss of a sum certain—even $100 million—against a congressionally declared 'incalculable' value." 437 U.S. at 187-88. But it said that to introduce the dispositive point: that Congress, as a substantive matter, had "emphatically" denied courts any power "to engage in such a weighing process." *Id.*

2. That emphatic judgment was not overruled when Congress amended the statute in 1978, requiring the Service to "tak[e costs] into consideration," 16 U.S.C. § 1533(b)(2), in making designations. To be sure, Congress thereby hoped "to avoid needless economic dislocation," *Bennett*, 520 U.S. at 176, but it specified the way that purpose is to be pursued—through the *process* of agency consideration itself, not through a judicially vindicable right to cost-justified designations. There is nothing anomalous about that approach. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (explaining that NEPA process "prohibits uninformed—rather than unwise—agency action"). And having held the line against judicial cost-benefit review of designations, it would make zero sense, as the decision below

recognized, for Congress to have finally authorized it in the guise of "abuse of discretion" review of the Service's *non-exercise* of its discretionary Section 4(b)(2) authority to exclude.

3. Nor does petitioner's alternative—and contradictory—argument, that the Court must treat the "single, unitary" decision as two separate ones, Petr. Br. 49, get petitioner the traction it seeks. To be sure, it would be troubling to hold nonreviewable a refusal to exclude a parcel that was based on the "religion of its owner," Markle Br. 49. But the decision below would not require that. In that hypothetical case, the Service's entire decision would be "final agency action," 5 U.S.C. § 704, and could be set aside on the ground that the last (non-exclusion) step was "contrary to constitutional right," *id.* § 706—or not based on the "best scientific data." In fact, if there really were two separate decisions—one to designate and the other to not exclude—and invidious prejudice infected only the latter, the proper remedy would be to *leave intact* the lawful critical habitat designation and only remand, to an unbiased agency official, the tainted non-exclusion decision. *Cf. Buck v. Davis*, 137 S. Ct. 759 (2017) (remanding for potential resentencing, not re-trial, based on racially invidious testimony in penalty phase).

4. Petitioner claims that if agency decisions *to exclude* are reviewable, then fairness requires courts perform the "same analysis" when "the Service ultimately decides . . . not to exclude." Petr. Br. 49-50. But this misunderstands courts' grounds for reviewing decisions to exclude. Such decisions are reviewable not because of the "*may*" language in Section 4(b)(2)'s second sentence, but because of the "*shall*" in the first.

A decision to exclude is "properly reviewable because it is equivalent to a decision not to designate critical habitat," *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 990 (9th Cir. 2015), which may be set aside as "not in accordance with law." If exclusion decisions were truly unreviewable, the Service could simply announce that critical habitat designations are always too costly, in derogation of Congress's substantive judgment. *Cf. Nat. Res. Def. Council v. U.S. Dep't of the Interior,* 113 F.3d 1121, 1126 (9th Cir. 1997) (rejecting the Service's expansive interpretation of its authority to deem designation "imprudent").

Indeed, in cases like this one, involving a species whose occupied habitat is specifically determined to be inadequate, it would be hard to imagine how an exclusion could be upheld—at least absent strong evidence that the biological benefits of designation were being achieved through other means. That, in practice, is how the Service generally has understood its exclusion power—not as authority for wholesale trade-offs of species conservation for economic benefit, but rather as a means to reward and encourage parties willing to take serious species-protective measures. *See, e.g.*, 78 Fed. Reg. 344, 389 (Jan. 3, 2013) (excluding areas from the critical habitat designation, citing existing "resource management plans [and] conservation plans"); 77 Fed. Reg. 72,070, 72,101 (Dec. 4, 2012) (similar).

5. "Reviewability" turns out to be the banner under which petitioner advances a far more ambitious proposal—one that seeks to second-guess the agency's core substantive decision. Review under the actual APA standards would be of no help to petitioner. The non-exclusion here was undeniably within the

Service's congressionally conferred discretion; and the Service's reasoning is manifest and manifestly rational, encompassing not only its brief statement of that decision, but its specific, unchallenged findings about this species' urgent needs and the "congressionally declared 'incalculable' value," *Hill*, 437 U.S. at 188, of preventing extinctions generally. (Indeed, given the breadth of the Service's discretion and the premise that insufficiently explained non-exclusions do not impugn proper designations, it is hard to imagine such claims' ever satisfying the APA's "prejudicial error" requirement. *See* 5 U.S.C. § 706.)

CONCLUSION

For the foregoing reasons, this Court either should hold that dismissal of petitioner's suit for lack of jurisdiction is required or, in the alternative, should affirm the judgment.

Respectfully submitted,

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No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF ON THE MERITS IN SUPPORT OF PETITIONER ON BEHALF OF MARKLE INTERESTS, LLC; P&F LUMBER COMPANY 2000; AND PF MONROE PROPERTIES, LLC

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

CORPORATE DISCLOSURE STATEMENT

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, have no parent corporations and no publicly held company owns 10% or more of their stock.

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OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 827 F.3d 452 (5th Cir. 2016). Petitioner's Appendix (Pet. App.) A. The opinion of the district court is reported at 40 F. Supp. 3d 744 (E.D. La. 2014). Pet. App. B. The denial of en banc review, with dissent, is reported at 848 F.3d 635 (5th Cir. 2016), Pet. App. C.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment on June 30, 2016. That court denied the petition for rehearing en banc on February 13, 2017. This Court granted an extension to file the Petition for Writ of Certiorari to and including July 13, 2017. Petitioner's Petition for Writ of Certiorari was filed on July 11, 2017, and the Court granted the Petition on January 22, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:

> The Congress shall have Power to . . . regulate commerce with foreign Nations, and among the several States, and with the Indian tribes.

U.S. Const., art. I, § 8, cl. 3.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The Endangered Species Act (ESA) provides in pertinent part:

> The term "critical habitat" for a threatened or endangered species means:
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any

> habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii).

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. § 1533(b)(2).

The Administrative Procedure Act (APA) provides in pertinent part:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or

> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a)(1)-(2).

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702.

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> ***

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]

5 U.S.C. § 706(2)(A)-(C).

INTRODUCTION

This case asks whether the U.S. Fish and Wildlife Service and its Director, and the Department of the Interior and its Secretary (collectively "the Service") exceeded their authority in designating thousands of acres of private land as critical habitat for the dusky gopher frog, even though the frog cannot survive on the land, it has virtually no connection to the species, and the designation will impose staggering costs on the property owners. The Service's decision—the first of its kind—conflicts with the plain meaning of the ESA, and the intent of Congress.

The ESA instructs that when prudent, the Secretary of the Interior designate as critical habitat those lands occupied at the time of listing the species as endangered or threatened, if the land contains physical or biological features essential to the species' conservation and requires special management considerations or protection. 16 U.S.C. § 1532(5)(A)(i); 16 U.S.C. § 1533(a)(3)(A). Designating areas not

occupied by a species at the time of listing is more difficult: the Secretary may only designate unoccupied areas as critical habitat when the habitat is "essential for the conservation of the species." *See* 16 U.S.C. § 1532(5)(A)(i).

The Service defied these limits by designating the land owned for the most part by Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC (collectively Family Landowners), as well as Weyerhaeuser Company, and St. Tammany Land Co., LLC. The designation imposes severe costs on these landowners and provides no actual benefit to the species, because the species cannot survive on the land. Although the Service conceded it had no agreements with the Family Landowners or other owners of Unit 1 to manage this site to provide habitat for the dusky gopher frog, the Service expressed its "hope" that the Family Landowners would make the dramatic changes that the owners would have to make to ever render the land habitable for the frog. 77 Fed. Reg. 35123 (June 12, 2012). Even though the ESA requires the Service to weigh economic costs with benefits to the species when designating critical habitat, the Service divorced any meaning from that requirement, deciding that its authority to list any land is unfettered and left to its sole discretion.

The Service strayed far from the constraints of the ESA and the clear intent of Congress. This Court should overturn the designation and make clear that such decisions are subject to judicial review and the plain requirements of the statute.

STATEMENT OF THE CASE

A. Designation of Critical Habitat for the Frog

In 2001, the U.S. Fish and Wildlife Service (Service) listed the Mississippi gopher frog as an endangered species, as required by the ESA. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62993 (Dec. 4, 2001); 16 U.S.C. § 1533(a)(1); 16 U.S.C. § 1532(6) (the Secretary of the Interior must list a species as "endangered" when it "is in danger of extinction throughout all or a significant portion of its range"). The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body." 66 Fed. Reg. 62993. Historically, it was present in parts of Louisiana, Mississippi, and Alabama. Pet. App. at 3a. At the time of listing, however, it was known to exist only in Harrison County, Mississippi, which is more than 50 miles from any of the land at issue in this case. 66 Fed. Reg. at 62994.

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the Service for failure to designate critical habitat for the Mississippi gopher frog. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31389 (June 3, 2010). The ESA requires the Secretary of the Interior to designate critical habitat for an endangered species when prudent and the agency has sufficient data to perform the required analysis. 16 U.S.C. § 1533(a)(3)(A); 50 C.F.R. § 424.12(a)(2) ("[d]esignation of critical habitat is not determinable when . . . [d]ata sufficient to perform required

analyses are lacking"). The designation must be based on "the best scientific data available" and may only be made after the Secretary considers and weighs the cost of all relevant impacts, including economic impacts. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(a).

The ESA places additional limitations on the designation by defining "critical habitat" as (1) areas occupied at the time of listing that contain essential "physical or biological features" that require "special management considerations or protection"; and (2) areas not occupied by the species at the time of listing, but that are "essential to the conservation of the species." 16 U.S.C. § 1532(5). Moreover, the ESA states a congressional intent that critical habitat, as a general rule, be narrow in scope: "critical habitat shall not include the entire geographical area which can be occupied by the [species]" unless the Secretary determines it is otherwise justified. *Id.*

The Service issued a Proposed Rule in June, 2010, to designate 1,957 acres in Mississippi as critical habitat for the frog. 75 Fed. Reg. 31387, 31395 (June 3, 2010). At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi." *Id.* at 31389. Additionally, the frogs had been successfully reintroduced at an additional site in Harrison County, Mississippi. *Id.* In designating critical habitat, the Service searched for "additional locations with the potential to be occupied by the . . . frog." *Id.* at 31394. The Service determined that "most of the potential restorable habitat for the species occurred in Mississippi." *Id.* at 31389. And that, "habitat in Alabama and Louisiana is severely limited" so the

Service "focus[ed] on identifying sites in Mississippi." *Id.* at 31394.

The Proposed Rule identified 11 "units" for designation as critical habitat in Mississippi—all within the DeSoto National Forest. *See id.* at 31396-31399. These included, federal land . . . managed by the State of Mississippi as a Wildlife Management Area, and private land used as a wetland mitigation bank. *Id.* at 31394. Four of the 11 units were partly occupied by the frog at the time of the Proposed Rule. *See id.* at 31396-31399. The seven unoccupied units were "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog." *Id.* at 31396.

In September, 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres. *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog 76 Fed. Reg. 59774 (Sept. 27, 2011). It did so in response to comments that more habitat was required to conserve the species. The Service expanded the radius of protection around frog breeding sites and designated an entirely new unit (Unit 1) consisting of more than 1,500 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site decades earlier in 1965. 76 Fed. Reg. at 59781, 59783. According to the Service, Unit 1 had the potential to provide habitat for the Mississippi gopher frog only if Unit 1 was significantly modified and the frog were transferred there. *Id.* at 59783.

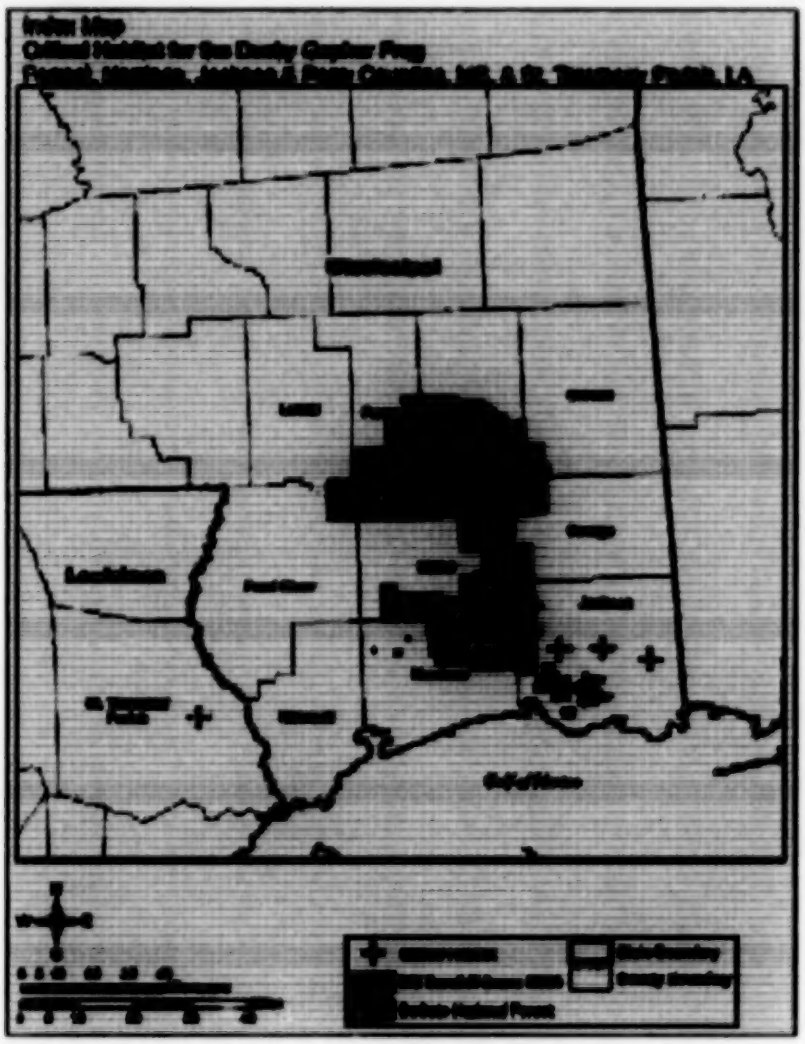
The Service issued its Final Rule on June 12, 2012, which announced the "Mississippi gopher frog" would now be called the "dusky gopher frog." Final

Rule, 77 Fed. Reg. 35118. (June 12, 2012). Additionally, the Final Rule designated a total of 6,477 acres as critical habitat, and included Unit 1 for a total of 12 units. *Id.* at 35119. The Service identified three physical and biological features that are essential for the survival of the dusky gopher frog, which are called "primary constituent elements." *Id.* at 35128; *see* 50 C.F.R. § 424.12(b).

The dusky gopher frog requires all of the following elements in its habitat: (1) small, isolated, ephemeral, acidic breeding ponds in an open canopy forest; (2) upland forests filled with frog-friendly burrows and "historically dominated by longleaf pine" with "abundant herbaceous ground cover" that are "maintained by fires frequent enough to support an open canopy"; and, (3) upland, open-canopy habitat with various "subsurface structure[s] that provides shelter" for the frog that allow it to move between the breeding ponds and the longleaf pine forests. Final Rule, 77 Fed. Reg. at 35131.

Eleven of the twelve units designated as critical habitat contain all three essential elements. *Id.* at 35131. But Unit 1 does not; the Service designated Unit 1 as critical habitat for the frog despite the fact that at best it contains perhaps only one of the essential elements of critical habitat and therefore cannot without significant modifications provide habitat for the gopher frog.

Unit 1 in St. Tammany Parish is at least 50 miles away from any of the other units, and separated by county lines, the state line, and the Pearl River, as well. *Id.* at 35146.



Id. The Service estimates the range of an individual dusky gopher frog extends less than half a mile from its breeding site, meaning it will *never* reach Unit 1 on its own. *See* Final Rule, 77 Fed. Reg. at 35130. Nevertheless, the Service maintains Unit 1 could provide a refuge for the frog should the other sites suffer "catastrophic events." *Id.* at 35124. In other words, the Service designated Unit 1 as "potential" back-up habitat.

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were clear cut, replanted with longleaf pines, and regularly subjected to controlled burns, it is entirely owned by private parties. Pet. App. 88a. The Family Landowners own the vast majority of Unit 1. *See* Pet. App. 88a. The Petitioner Weyerhaeuser, Co., and amicus curiae St. Tammany Land Co. own the rest of Unit 1, and Weyerhaeuser leases the Family Landowners' property for its timber business. Pet. App. 88a. These private parties intend to harvest the timber and then develop the site. *See* March 12, 2012, Public Comment on Behalf of P&F Lumber. (Pet. Jt. App. at JA60; *id.* at JA59) ("The frog will never be present on the Lands as the [Service] cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the [Service] says are needed for the frog to live on the Lands."); November 23, 2011 Public Comment on Behalf of P&F Lumber, at 4 (Jt. Pet. App. at JA33) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands."). Instead, the Family Landowners have leased the land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible. *See id.* at 4-5 (Jt. Pet App. at JA32-33). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. *See* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. at 35123. The Service expressly acknowledged it cannot compel the Family Landowners to convert Unit 1 into suitable habitat, and the designation of critical habitat itself does not

"establish a refuge, wilderness, reserve, preserve, or other conservation area." *See* Revised Proposed Rule, 76 Fed. Reg. at 59776.

B. The Service Disregards the Severe Economic Impact of the Designation and Fails To Exclude Unit 1

Under the ESA, the Service must also "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude any area from critical habitat" based on economic impacts. 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis[1] of the potential economic impacts caused by the designation of critical habitat for the dusky gopher frog. Final Rule, 77 Fed. Reg. at 35140-41. This analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector." *Id.* at 35140. The Service found "most of the estimated incremental impacts [of the designation] are related to possible lost development value in Unit 1." *Id.* The Service recognized the Unit 1 landowners "have invested a significant amount of time and dollars into their plans to develop this area," Final Economic Analysis at 4-3 (¶ 73), and, under Section 7 of the ESA, the critical habitat designation

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[1] *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf (Final Economic Analysis).

could severely limit, or even foreclose entirely, such development.

"A critical habitat designation provides protection for threatened and endangered species by triggering what is termed a Section 7 consultation in response to actions proposed by or with a nexus to a federal agency." *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115 (D.D.C. 2004). Under Section 7(a)(2) of the ESA (16 U.S.C. § 1536(a)(2)), each federal agency must consult with the Service to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." Accordingly, any actions undertaken on Unit 1 by the landowners having a "federal nexus," including actions requiring a federal permit, would trigger a Section 7 consultation.

The Service's Economic Analysis found that the designation of Unit 1 could cost landowners $34 million over a twenty-year period by stopping development of the property. Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73-77, 87). The total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years, because those units are already actively managed for the recovery of the frog. *See* Final Rule, 77 Fed. Reg. at 35140; 75 Fed. Reg. 39396-99 (July 8, 2010). Therefore, under either the second or third scenario, more than 99 percent of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1.

Despite the heavy and lopsided economic impact on private parties caused by the designation of Unit 1, the Service could identify no direct benefits to the frog from its designation. The Service's economic analysis found only ancillary benefits, such as increased property value for adjacent properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem. *Id.* In the Final Rule, the Service stated "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking." Final Rule, 77 Fed. Reg. at 35127. The Service never specifically identified these "biological" benefits or attempted to determine their likelihood or weigh them against the heavy costs imposed on the Family Landowners. Instead, the Service simply concluded without explanation that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

C. Procedural Background

After their comments failed to persuade the Service to revise the designation of Unit 1, Markle Interests, LLC, filed suit against the Service challenging the Final Rule on statutory and constitutional grounds. Next, P&F Lumber Company 2000, LLC; PF Monroe Properties, LLC; and St. Tammany Land Co., LLC, which together own the vast majority of the land at issue, filed the same claims against the same defendants. Lastly, Weyerhaeuser Company filed the same claims against

the same defendants. The Landowners sought the invalidation of the final designation only insofar as it concerned Unit 1, recognizing that the Service had legitimately designated abundant habitat for the dusky gopher frog in Mississippi. These lawsuits sought identical declaratory and injunctive relief, and were consolidated before the district court. The Center for Biological Diversity and the Gulf Restoration Network were granted leave to intervene, of right, as defendants.

On August 22, 2014, the district court recognized the injury inflicted on the Landowners by the designation, but rejected their argument that Unit 1 did not qualify as critical habitat. App. B at 79a, 122a. The Court described the Service's designation of Unit 1 as "odd," "troubling," "harsh," and "remarkably intrusive [with] all the hallmarks of governmental insensitivity to private property." *Id.* at 103a, 133a, 115a, and 118a. Nevertheless, the Court deferred to the agency decision and affirmed the Final Rule. *Id.* at 122a.

The Family Landowners appealed. The Fifth Circuit affirmed in a 2-1 split opinion. The panel majority concluded the Service's designation was entitled to *Chevron*[2] deference, despite the Service's concession that the frog does not occupy Unit 1, that Unit 1 cannot sustain the frog, and that the changes that would have to be made to make Unit 1 habitable

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[2] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* deference holds that courts must defer to an agency's authoritative and reasonable interpretation of ambiguous language found within a statute that it administers.

will not be made in the foreseeable future, if ever. App. A at 16a.

In addition to their statutory claim that critical habitat must be actual habitat, the landowners challenged the designation under the Commerce Clause. *Id.* at 7a. The panel majority rejected the Commerce Clause challenge relying on a prior Fifth Circuit decision holding the ESA is a constitutionally permissible market regulatory scheme. *Id.* at 37a-45a. Next, the majority held that the Service's failure to exclude Unit 1 because of the disproportionate economic impacts the designation imposed on the landowners, was wholly discretionary and "unreviewable." *Id.* at 35a-39a. Lastly, the Court held critical habitat designations are not subject to the National Environmental Policy Act. *Id.* at 45a-47a.

Judge Owen dissented from the panel decision, identifying "a gap in the reasoning of the majority opinion that cannot be bridged[]." *Id.* at 48a. Judge Owen observed the designated area is not essential for the conservation of the species "because it plays no part in the conservation" of the species. *Id.* More specifically, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id.* In fact, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species. *Id.* Judge Owen concluded: "Land that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat.'" *Id.*

Because the majority opinion interpreted the ESA to allow the government to impose restrictions on private land that "is not occupied by the [] species,"

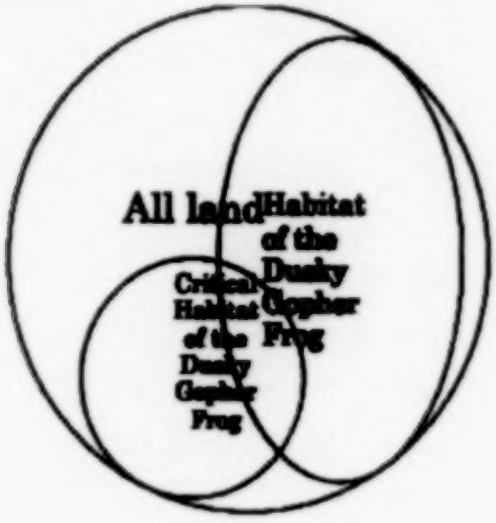
and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance," that the government cannot effectuate, *id.*, Judge Owen warned the panel decision would unduly subject large areas of the United States to strict federal regulation "because it is theoretically possible, even if not probable, that [vast portions of the United States] could be modified to sustain the introduction or reintroduction of an endangered species." *Id.* at 49a.

The full Fifth Circuit rejected the landowners' motion for en banc review with an 8-6 vote. Writing for the six-member dissent, Judge Jones argued the Service's actions in this case fell far outside the parameters of the ESA, because it provided "[n]o conservation benefits" to the frog, but "costs the Louisiana landowners $34 million in future development." Pet. App. B at 125a. On the merits, the dissent concluded the panel erred because (1) the ESA requires critical habitat to be inhabitable by the species; (2) Unit 1 is not essential to the conservation of the species because it lacks features essential to the species survival; and (3) the Secretary's decision weighing the economic harm with benefits to the species is judicially reviewable and the Secretary's decision was an abuse of discretion. *Id.*

Judge Jones noted that the two judges who affirmed the district court decision simply overlooked Section 1533a(a)(3)(A)(i) of the ESA that requires unoccupied habitat to nevertheless be a subset of a species' habitat. In short, "whatever is 'critical habitat,' according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the

entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species." Pet. App. at 132a.

To illustrate this point, Judge Jones used two helpful Venn diagrams. In one image, she set out the panel's approach, which failed to account for Section 1533(a)(3)(A)(i):



This Venn diagram highlights the error of the panel decision, which allows "critical habitat" for a species to include land that is not habitable for the species. *Markle Interests, L.L.C. v. United States Fish and Wildlife Service*, 848 F.3d 635, 643 (Jones, J., dissenting from denial of rehearing en banc).[3] The

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[3] This brief cites here to the Federal Reporter rather than Petitioner Weyerhaeuser's Appendix because, due to a scrivener's error, that appendix did not reproduce the Venn diagrams that Judge Jones included in her dissent. *See* Pet. App. 137a-138a.

ESA instead adopts this more logical approach to habitat for a species, as demonstrated in a second image created by Judge Jones:

Id. As shown by Judge Jones's second Venn diagram, the ESA provides that critical habitat is a subset of habitat. *Id.* The panel failed to account for this logical requirement. *Id.* If a species cannot live on land, then it falls outside of habitat for the species and cannot qualify as "critical habitat." *Id.*

The dissent was unequivocal: "Properly construed, the ESA does not authorize this wholly unprecedented regulatory action." *Id.* at 125a.

SUMMARY OF ARGUMENT

Since the ESA does not define the word "habitat," or suggest that it is used in any other than its ordinary meaning, the Court should give the term its ordinary meaning of "the place where a particular species of animal or plant is normally found." Habitat, Black's Law Dictionary (10th ed. 2014). The Service's stretched interpretation of "habitat," as susceptible of including land on which the frog cannot currently survive, land on which it has not been seen in 50 years and will not be seen again *ever* absent modifications that the Family Landowners and other owners will not make, violates the plain meaning of the ESA and is ineligible for judicial deference under *Chevron*.

Nor does the ESA define "essential," whose ordinary meaning is "of the utmost importance: basic, indispensable, necessary." Essential, Merriam-Webster.com, www.merriam-webster.com/dictionary/Essential.

The Service's interpretation of "essential" as including land that cannot now support the species and never will absent vast and very expensive major modifications that will not be made, and which is remote from the other 11 units of designated habitat, all of which actually provide currently suitable habitat, stretches the statutory term far beyond its breaking point and is similarly ineligible for *Chevron* deference.

Even if the text of the ESA admitted of any ambiguity, the legislative history of the 1978 Amendments to the ESA demonstrate Congress's intent that unoccupied habitat be harder to designate than occupied habitat, and limited to areas that are

truly necessary to conservation, not merely speculatively useful in some possible and unknown future. House Agreement to Conference Report on S. 2899 in A Legislative History of the Endangered Species Act of 1973, as amended in 1976, 1977, 1978, 1979, and 1980, 97th Cong., Congressional Research Service at 1220-21 (Comm. Print 1978), http://www.eswr.com/lh/ (A Legislative History of the ESA). *See also Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat"); *Cape Hatteras*, 344 F. Supp. 2d at 108, 122 ("The [Service] may not statutorily cast a net over tracts of land with the mere hope that they will develop [the physical and biological elements species require to survive] and be subject to designation.").

If the Service's interpretations of "habitat" as uninhabitable land, and "essential" as merely useful (perhaps, one day), are reasonable interpretations of the ESA, this Court should nonetheless reject them under the canon of constitutional avoidance. *See Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (*SWANCC*). The Service's interpretation of these terms enables the agency to impose conservation restrictions on private property with no connection at all to the species being conserved, which itself is an intrastate species with no connection to interstate commerce.

The Secretary's decision not to exclude Unit 1 from critical habitat is judicially reviewable under the APA. This Court should consider revisiting its

decision in *Heckler v. Chaney*, in favor of Justice Scalia's dissent in *Webster v. Doe*, given the breadth of the *Heckler* "no law to apply" standard [as applied by the lower courts] and the *Webster* dissent's superior explanation of the meaning of 5 U.S.C. § 701(a)(2).

The Secretary's refusal to exclude Unit 1 is certainly subject to judicial review under the *Webster* dissent because it is not the type of decision that the federal courts have traditionally declined to review. But *Heckler* itself does not render the Secretary's decision unreviewable, since "law to apply" is supplied by the ESA (benefits of exclusion outweigh those of inclusion, where exclusion will not lead to extinction), the APA (arbitrary and capricious, an abuse of discretion, or otherwise contrary to law), and general principles of administrative law. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (rational connection between facts found and decision made); *Columbia Falls Aluminum Co. v. Environmental Prot. Agency*, 139 F.3d 914, 923 (D.C. Cir. 1998) (rational relationship between methodology and reality being considered).

The decision not to exclude is also subject to judicial review under *Bennett v. Spear*, which holds that the Secretary's duty to engage in economic analysis of the impacts of critical habitat designation is mandatory and reviewable for abuse of discretion. 520 U.S. 154 (1997).

ARGUMENT

I

THE SERVICE VIOLATED THE TEXT AND INTENT OF THE ESA BY DESIGNATING UNIT 1 CRITICAL HABITAT

The ESA provides strict limits on the type of land that can be designated critical habitat. To designate land that was occupied by the species at the time it was placed on the endangered species list, the land must contain "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i)-(ii). The standard for designating critical habitat that is not occupied by an endangered or threatened species at the time of listing is more demanding. *Cape Hatteras*, 344 F. Supp. 2d at 125 ("Designation of unoccupied land is a more extraordinary event than designation of occupied lands."). To designate unoccupied land as "critical habitat," the Secretary must determine that the property is "essential to the conservation of the species." 16 U.S.C. § 1532(5)(ii); 50 C.F.R. § 424.12(e) (2014) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.").

The ESA does not define "habitat" or "essential." Absent a definition, the Court must read these words consistent with their plain meaning. *NISH v. Rumsfeld*, 348 F.3d 1263, 1270 (10th Cir. 2003) ("Our

first inquiry is whether the interpretation complies with the plain meaning of the statutory language.").

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). This Court assumes the ordinary meaning of language employed by Congress accurately expresses its legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). Where the words are clear, they are controlling. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking Ass'ns*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.").

A plain interpretation of the ESA exposes the folly of the Service's designation of Unit 1 in this case. The designation strays far from the plain meaning of "critical habitat" or "essential to the conservation of a species," as laid out in the ESA. Moreover, even if the statute were ambiguous, Congress made its intentions clear when it passed the 1978 Amendments to the ESA, which defined "critical habitat," that it sought to place firm limits on the scope of what the Service could

designate as critical habitat. By designating Unit 1, the Service violated these limits.

The Court should reverse the Fifth Circuit's decision and restrain the Service from exceeding its authority under the ESA.

A. The ESA Requires Critical Habitat Be Habitable and Essential for the Conservation of a Species

1. "Habitat" Must Be Habitable; Otherwise It Is Not Habitat

The term "critical habitat" is not a term of art divorced from its plain language. It is descriptive. The word "habitat" denotes a place where species live and grow. *See* Pet. App. at 134a ("'Habitat' is defined as 'the place where a plant or animal species naturally lives and grows.' Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ('[T]he kind of place that is natural for the life and growth of an animal or plant[.]'); Habitat, Black's Law Dictionary (10th ed. 2014) ('The place where a particular species of animal or plant is normally found.'")).

The ESA makes clear that all critical habitat is, by definition, "habitat" for the species:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that

> a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii) (emphasis added). This language is clear and determinative. Critical habitat is a subset of a species' larger habitat. *See id.*[4]

In other words, all "critical habitat" must be, at a minimum, "habitat." "Habitat" exists for an organism where the resources can be found that allow it to survive. Linnea S. Hall, et al., *The Habitat Concept and a Plea for Standard Terminology*, 25(1) Wildlife Soc'y Bulletin 173, 175 (1997); John M. Frywell, et al., *Wildlife Ecology, Conservation, & Mgmt.* 427 (3d ed. 2014) ("The place where an animal or plant normally lives, often characterized by a dominant plant form or physical characteristic (e.g. soil habitat, forest habitat)."). In other words, "habitat" is a place naturally usable and accessible to the species.

Unit 1 lacks the physical and biological features essential for the dusky gopher frog to survive—all parties admit as much. Therefore, because Unit 1 is not "habitat," the designation of 1,544 acres of Unit 1 as critical habitat is contrary to the plain meaning of the ESA and the express intent of Congress.

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[4] The agency's own regulations support this logical position. For example, federal regulations implementing Section 7 of the ESA "impose requirements upon Federal agencies regarding endangered or threatened species . . . *and habitat of such species that has been designated as critical ('critical habitat')*." 50 C.F.R. § 402.01(a) (emphasis added).

It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (citations omitted). Thus under "step one" of the *Chevron* doctrine, the Service is not entitled to deference.

The Court should enforce that plain meaning here and hold invalid the designation of Unit 1.

2. Unit 1 Is Not Essential to the Conservation of the Species

The ESA allows unoccupied habitat to be designated as critical habitat only when it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The ESA does not define "essential," nor has the Service defined the word. In the absence of a definition, this Court should look to the plain meaning of the word "essential." Merriam-Webster Dictionary defines "essential" in relevant part as "of the utmost importance: basic, indispensable, necessary.'" Essential, Merriam-Webster.com, www.merriam-webster.com/dictionary/Essential.

The land in Unit 1 is not used or occupied by the species; it is not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without expensive modifications that the property owners will not make; and, it does not support the existence or conservation of the species in any way. Pet. App. A at 49a-51a. It is axiomatic that an area that has no connection to a species or its habitat cannot be "essential for the conservation of the species" as contemplated by the statutory text.

Rather than demonstrate that the area is actually essential to the frog, the agency argues only that the area could prove useful in case some speculative, catastrophic event—like "disease and droughts" caused at some unknown date and location—destroys the habitat in the other 11 units. 77 FR 35118, 35124 ("Unit 1 provides a refuge for the frog should the other sites be negatively affected by environmental threats or catastrophic events."). Although the land in Unit 1 cannot presently support the frog, the Service piles speculation on speculation stating that it "hope[s]" to work with the private owners to convert their private land into suitable frog habitat, as a backup plan in case the other 5,000 acres prove inadequate as a result of future catastrophes. *See* 77 Fed. Reg. 35118, 35123. In other words, the Service only speculates that the land might someday become valuable to the frog.

Unit 1 provides no conservation benefit to the dusky gopher frog,[5] and it never will as it is now nothing more than theoretical "potential backup habitat" in the event of a catastrophe; even in the event of a catastrophe the land cannot sustain the frog. Those actual benefits that critical habitat must provide are provided by the thousands of acres of actual habitat designated as critical habitat in the State of Mississippi. The Service's "interpretation of 'essential' . . . goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean." Pet. App. at 56a. Therefore, as this Court has

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[5] *See Cape Hatteras*, 344 F. Supp. 2d at 108, 122 ("The [Service] may not statutorily cast a net over tracts of land with the mere hope that they will develop [the physical and biological elements species require to survive] and be subject to designation.").

explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)). This is such an interpretation.

Moreover, "essential for the conservation of the species" is a more demanding standard than the requirement for occupied habitat that it contain the needed biological features for the species.[6] However, the Service lowered the bar in this case and asserts it may designate any unoccupied area as critical habitat so long as that area contains at least one of the essential biological features. This approach makes it *less* onerous to designate unoccupied areas as critical

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[6] *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat"); *Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d at 119 ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

habitat contrary to a logical reading of the statute and the intent of Congress.

The designation of Unit 1, based on the presence of a single suitable physical feature for a species, does not satisfy the more onerous test the ESA requires for designating unoccupied areas as critical habitat. It certainly does not limit the scope of critical habitat designations with which Congress was concerned when it amended the ESA in 1978. "In sum, we know from the ESA's text, [legislative] history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation." (Pet. App. at 149a). Accordingly, "the panel majority misconstrue[d] the statute. . . ." *Id.*

3. Courts Must Give Effect to Unambiguous Intent of Congress as Expressed in the ESA

If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842-43 (1984). The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. *Id.* at 843 n.9 (1984). The above explication of "habitat" and "essential" as used in the statute mean the lower courts' analyses should have ended with step one of *Chevron* and held that the Service had twisted the definition of "critical habitat" beyond the

intent of Congress and rejected the designation of Unit 1.

To uphold the intent of Congress, as expressed in the plain language of the ESA, this Court should reverse and hold that private property that is unsuitable as habitat, and does not contribute to the conservation of a listed species, does not constitute critical habitat under the ESA.[7]

B. Legislative History Demonstrates the Service Exceeded Its Authority When It Designated Unit 1 as Critical Habitat

If there is any question about what qualifies as unoccupied critical habitat under the ESA, ostensibly requiring a resort to *Chevron* step 2, legislative history makes clear that Congress intended it to be more limited than proposed by the Service here. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 210 n.29 (1978) (only necessary to look to legislative history where a statute is ambiguous). The ESA initially did not define "critical habitat." *See generally* Endangered Species Act of 1973, Pub. No. 93-205. The interpretative regulations at that time provided that

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[7] To be sure, if the Government believes Unit 1 important enough to sustain the frog despite the fact that conditions do not allow its survival without substantial changes, the Government has a different option provided for by the ESA: it can buy it. 16 U.S.C. § 1534(a)(2) (authorizing the Secretary "to acquire by purchase, donation, or otherwise, lands, waters, or interest therein" to conserve fish, wildlife, and plants); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995) ("The Secretary may also find the § 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species.").

the Service list critical habitat "solely on the basis of biological factors." H.R. Rep. No. 95-1625 (1978), in A Legislative History of the ESA at 731-32. But the authority was broad: "[T]he Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured." *Id.* at 731-32 (emphasis added).

After *Tennessee Valley Authority*, 437 U.S. 153, interpreted the ESA as broadly prioritizing the conservation of species above human interests, no matter the cost, Congress responded by amending the ESA to better protect human interests. *See* H.R. Rep. No. 95-1625, in A Legislative History of the ESA at 734, 737, 741. Congress was also troubled by expansive critical habitat designations. *See, e.g.*, H.R. Rep. No. 95-1625, in A Legislative History of the ESA at 742 ("The committee believes, nonetheless, that the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied areas of the species.").

Throughout the entire legislative process, both the Senate and House made clear that critical habitat should only include those lands truly necessary for the survival of the species. Looking to limit the reach of critical habitat, the Senate Committee on Environment and Public Works Report asked the U.S. Fish and Wildlife Service to examine and deliver a report addressing "ambiguity in its regulatory process for critical habitat designations" because it disagreed with the Service's practice of designating as critical habitat lands needed for population expansions. Rather, the committee suggested only "lands which

are critical to a species continued survival" should qualify as critical habitat. Senate Report 95-874 (1978), in A Legislative History of the ESA at 947-48. The Senate subsequently amended the newly proposed definition of critical habitat on the Senate floor to adopt a definition that is similar to the current definition. *See* Senate Consideration and Passage of S. 2899, With Amendments on July 19, 1978, in A Legislative History of the ESA at 1108-109. Senator Garn proposed the adopted amendment saying the extent of critical habitat should usually be smaller than the "entire range of the endangered or threatened species." *Id.* at 1101, 1080-81.

At the same time, the House was considering its own amendments to the ESA. When the House considered its bill on the House floor, Representative Duncan of Oregon successfully proposed an amendment similar to the current definition of "critical habitat." House Consideration and Passage of H.R. 14104 (Oct. 14, 1978), With Amendments, in A Legislative History of the ESA at 879-81. Duncan explained that consultation "developed into the most significant part of the entire statute," in part because the ESA did not define critical habitat. *Id.* at 880. Regarding habitat unoccupied at the time of listing, the proposed amendment required "a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* at 881. He elaborated that to qualify as "essential" that it is not enough for the Service to simply show that excluding it "would appreciably or significantly decrease the likelihood of conserving it." This distinction, he thought, went "to the heart of the problem which every Member has felt in his district." *Id.*

The House and Senate ultimately conferred to reconcile their different ESA bills and to settle on one bill amending the ESA. The conference report does not mention the differences between the House and Senate versions and only states that it adopted a critical habitat definition contained in both versions. Conference Report No. 95-1804 in A Legislative History of the ESA at 1208. Representative Murphy explained "the Senate and House bills were not really all that far apart" but the House version was "considerably more developmentally oriented." House Agreement to Conference Report on S. 2899 in A Legislative History of the ESA at 1220-221. He said, "the guts of the House bill have been retained in the conference report. These include: . . . . An extremely *narrow definition of critical habitat*, virtually identical to the definition passed by the House." *Id.* (emphasis added).

In sum, Congress intended to strictly limit the breadth of the critical habitat designation such that it would not apply to non-habitat in hopes that the landowners would voluntarily modify the property to make it a useful bank against harm caused to a species by speculative "catastrophic events."

C. The Constitutional Avoidance Doctrine Requires Court To Reject the Service's Interpretation of the ESA

The doctrine of constitutional avoidance cautions that agency interpretations that authorize an agency to "push the limit of congressional authority" should be avoided as a matter of prudence. *SWANCC*, 531 U.S. at 172-73. Here, interpreting the ESA in the manner the Service wishes would force the Court to evaluate whether this application of "critical habitat" runs beyond Congress's Commerce Clause authority. The basis for that policy lies in this Court's desire "not to needlessly reach constitutional issues" and this Court's assumption "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73.

According to this Court, the Corps pushed the limits of congressional authority in *SWANCC* when it "claimed jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id.* at 173. The constitutional conflict arose because the Corps could not identify a consistent basis for such regulation under the commerce power. This is significant, the Court stated, because it had twice affirmed "the proposition that the grant of authority under the Commerce Clause, though broad, is not unlimited." *Id.* *See United States v. Morrison*, 529 U.S. 598, 613 (2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress may regulate intrastate

economic activity where the activity substantially affects interstate commerce.). More recently, this Court explained: "[A]s expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity;'" specifically, "existing commercial activity." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572-2573 (2012)

This Court could have been describing this case, because the same conflict arises. It is unclear what, if any, Commerce Clause connection the Service relies on to claim jurisdiction over the land and water in Unit 1. The record is devoid of any jurisdictional statement. It is undisputed that the dusky gopher frog is an intrastate, noncommercial species. Virtually the only connection between Unit 1 and the dusky gopher frog is the critical habitat designation itself. This Court has never upheld a Commerce Clause regulation based on such a tenuous link to interstate commerce. Like the hydrologically isolated ponds in *SWANCC*—that this Court held could not be regulated without raising a constitutional conflict under the Commerce Clause—the biologically isolated ponds in Unit 1 also raise a constitutional conflict under the Commerce Clause. Therefore this Court should interpret the ESA to avoid this conflict.

Moreover, this Court's concern over needlessly reaching constitutional issues, unless Congress clearly intends to push the limits of constitutional power, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The

traditional state power that concerned this Court in *SWANCC* was the power of the state to control local land and water use, much like this case. "Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the State's traditional and primary power over land and water use." *Id.* at 174. That impingement created a constitutional conflict. It is no wonder that both 18 states and St. Tammany Parish (where Unit 1 sits) filed amicus briefs in support of Weyerhaeuser in the instant case and Markle in 17-74 at the petition stage. The designation of local land and water features as critical habitat, like Unit 1, that do not provide any conservation benefit to a listed species is a quintessential impingement on the powers of the States in violation of the Tenth Amendment.

To avoid needlessly reaching these constitutional issues, this Court should hold the government to a proper interpretation of the statutory text. Under the ESA, critical habitat must be habitat.

II

THE SERVICE'S DECISION NOT TO EXCLUDE UNIT 1 FROM CRITICAL HABITAT DESPITE THE ECONOMIC IMPACT OF THE DESIGNATION IS SUBJECT TO JUDICIAL REVIEW

Under the ESA, the Service may exclude areas that otherwise qualify as critical habitat from a designation if the government determines that the benefits of exclusion outweigh the benefits of inclusion, and if the exclusion would not result in the species' extinction. *See* 16 U.S.C. § 1533(b)(2). The lower court held that a decision not to exclude an area

is immune from judicial review under the APA, pointing to the APA's bar on judicial review of agency action "committed to agency discretion by law" as construed by this Court in *Heckler*. Pet. App. at 33a. The *Heckler* "no law to apply" standard is rarely actually true of any given agency action, because all agencies must meet fundamental principles of rationality and fairness—e.g., principles derived from the U.S. Constitution and federal administrative common law, such as the "rational connection" requirement, *see Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43, or the principle regarding cost-benefit disproportion. *See Michigan v. Environmental Prot. Agency*, 135 S. Ct. 2699, 2707 (2015). Courts routinely manage these principles all the time. Hence, denial of judicial review on the ground of "no law to apply" is almost always improper, because at least some law, including the law derived from the Constitution, Bill of Rights, and federal administrative common law, is available. *See Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting).

If an agency action falls within a category traditionally immune from judicial review—for example, official immunity or political question—then the bar should apply. *See* Damien Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas From Critical Habitat Should Be Reviewable Under the APA*, 47 ELR 10352 (2017). Otherwise, this Court should recognize that Congress intended § 701(a)(2) to continue a common law of judicial review, which "had marked out, with more or less precision, certain issues and certain areas . . . beyond the range of judicial review. *Webster*, 486 U.S. at 608 (Scalia, J., dissenting). Since those areas do not include the Service's decision on whether to exclude an area from

critical habitat, courts should review decisions on whether to exclude an area from critical habitat for an abuse of agency discretion, as Judge Jones concluded. Pet. App. 160a-61a.

A. That the APA Commits Some Decisions to Agency Discretion Not Subject to Judicial Review Does Not Mean This Decision Is Unreviewable

1. Challenging Agency Action: When Agency Action Is Committed to Agency Discretion and Unreviewable by Law

a. The "No Law To Apply" Standard Should Be Limited

The APA provides the fundamental charter for administrative decision-making in the federal system. Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 Ind. L.J. 1207, 1208 (2015) ("The Administrative Procedure Act . . . is one of the most important statutes in the United States Code. . . . [T]he [Act] is still the 'fundamental charter' of the 'Fourth Branch' of the government.") (quotation omitted). Further, the APA provides a right of judicial review to persons who are aggrieved by federal agency action. *See* 5 U.S.C. §§ 702, 704. This right is limited in two ways: first, the courts must apply generous standards of review for agency action subject to challenge under the APA, *see Motor Vehicle Mfrs. Ass'n of the U.S.*, 463 U.S. at 43 ("The scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency."); and second, the APA denies judicial review when it is precluded by statute, 5 U.S.C. § 701(a)(1), as well as when the

action "is committed to agency discretion by law." *Id.* §701(a)(2).

Whether review is "precluded by statute" is easy enough to determine. But not so with the APA's second exclusion—those actions committed to agency discretion by law. This Court addressed this second category in *Heckler v. Chaney*, 470 U.S. 821 (1985), and the lower court relied upon *Heckler* to conclude the decision not to exclude Unit 1 was unreviewable.

In *Heckler*, this Court held that agency action "committed to agency discretion by law" means that judicial "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830. This Court provided little guidance to elaborate upon the "no law to apply" test, other than to explain that agency decisions not to criminally prosecute or civilly enforce are beyond judicial review, *id.* at 831-33, and to hold that the "no law to apply" test applies when Congress intends for it to apply. *See Webster*, 486 U.S. at 601.

b. Justice Scalia Offers a Better Approach Than the "No Law To Apply" Standard

As opposed to the *Heckler* "no law to apply" test, Justice Scalia's dissent in *Webster v. Doe* offers a better way to apply the APA's discretion-committed exception to judicial review. *Webster* involved a former CIA employee who challenged his employment termination. *Id.* at 599-601. Doe contended the CIA terminated him because of his homosexuality, and that this termination violated the agency's own governing statutes, regulations, and the Constitution.

Id. The lower courts ruled the courts could review Doe's claims, but this Court disagreed in part. *Id.* Based in large part on the unique circumstances of national security, the Court held the National Security Act commits to the CIA director's absolute, statutorily granted, discretion the decision on whether to terminate a CIA employee. *Id.*

That being said, the Court then also held that, although Congress intended to grant unfettered discretion to the CIA director to act under the enabling statute, Congress had evinced no such intent in regards to colorable constitutional claims. *Id.* at 602-04. The Court concluded that Doe's constitutional challenges could proceed. *Id.*

Justice Scalia dissented. He explained that Congress had given the CIA director absolute discretion to terminate employees, power not even subject to reviewability for unconstitutional conduct. *See id.* at 615-16. He explained that the "no law to apply" standard did not accurately convey what Congress meant in § 701(a)(2). *Id.* at 607-08. As he saw it, "there is no governmental decision that is not subject to a fair number of legal constraints precise enough to be susceptible of judicial application—beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest." *Id.* at 608. Yet, "there are many governmental decisions that are not at all subject to judicial review," such as a prosecutor's decision to prosecute even when that decision is based on personal animus. *Id.*

Therefore, the "key to understanding" § 701(a)(2), is to compare it with § 701(a)(1). *Id.* Recall that the latter provision forecloses review "to the extent that

. . . statutes preclude judicial review." *Id.* The question then arises: "Why 'statutes' for preclusion, but the much more general term 'law' for commission to agency discretion?" *Id.* The answer, Justice Scalia explained, is that Congress intended §701(a)(2) to keep in place a certain common law of judicial review, which "had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review." *Id.*

Examples of those issues include the doctrines of political question, sovereign immunity, and official immunity, along with prudential limitations on courts' powers and "what can be described no more precisely than a traditional respect for the functions of the other branches." *Id.* at 609. Accordingly, the key inquiry to correctly applying §701(a)(2)'s bar on review is not, "Is there law to apply?" but rather, "Is this the type of decision that, for a variety of reasons, courts traditionally have declined to review?" Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas From Critical Habitat Should Be Reviewable Under the APA*, 47 ELR at 10360.

Justice Scalia's approach resolves how to observe the APA's bar on review of action committed to agency discretion yet also observe the Act's separate authorization for "abuse of discretion" review. *See* 5 U.S.C. § 706(2)(A). By acknowledging that judicial review does not turn solely on whether an action is truly "discretionary," but instead should turn on whether the agency decision falls within a category of traditionally non-reviewable action, *Webster*, 486 U.S. at 609-10 (Scalia, J., dissenting), the two principles are harmonized. Since the decision here does not fall into a category of agency action that the courts have

refrained from reviewing, then the fact that the action is discretionary should not preclude the courts from determining whether the Service abused its discretion in making its decision.[8]

2. Applying the Scalia Test, the Service's Decision Weighing Economic Impact with Conservation Benefits Should Be Subject to Judicial Review

Is exclusion decision making not akin to the discretionary decision that the Supreme Court in *Heckler* held to be non-reviewable? *See Heckler*, 470 U.S. at 838. Contrary to the Fifth Circuit's conclusion, *see Heckler*, 470 U.S. at 838, exclusion decision making is not akin to the discretionary decision that this Court held to be non-reviewable in *Heckler*. *Heckler* concerned an agency decision *not to enforce*, *see id.* at 837-38 ("The [U.S. Food and Drug Administration's] decision not to take the enforcement actions requested by respondents is therefore not subject to judicial review under the APA."), whereas a decision not to exclude an area of critical habitat is effectively a decision *to enforce* the ESA's rules regarding critical habitat, just as Judge Jones explained in her cogent dissent from the denial of rehearing en banc. *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, No. 14-31008, 2017 WL 606513, at *15 n.21 (5th Cir. Feb. 13, 2017) (Jones, J., dissenting from denial of rehearing en banc) ("[T]he Service's

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[8] Adopting the Scalia test would not require the Court to reverse *Webster*. That Scalia developed the correct interpretation of §701(a)(2) does not mean he also correctly determined that the alleged discrimination at issue fell within the traditional category of "no review" agency action.

decision not to exclude . . . is really part and parcel of the Service's decision to include. . . .").

Moreover, none of the concerns that led the *Heckler* Court to rule against the availability of judicial review—the fear of intruding upon prosecutorial decision making, infringing upon agency discretion over how to expend government resources, or improperly inserting the judiciary into an agency's enforcement prioritization, *see Heckler*, 470 U.S. at 831-32—have anything to do with a critical habitat exclusion. When declining to exclude areas from critical habitat, the Service does not: i) act like a prosecutor; ii) decide how best to use its resources; and is not prioritizing enforcement. Instead, it is determining that an area subject to active enforcement of the ESA's critical habitat rules—should indeed be included in the critical habitat, notwithstanding the economic and other non-biological consequences of the designation. Simply put, critical habitat exclusion decision making is not the type of agency activity traditionally considered non-reviewable.

Certainly, the ESA itself does not provide a court with a standard by which to adjudge an exclusion decision. But that is not the end of the analysis. Although the ESA may not explicitly provide the law to apply, the Constitution and administrative law do so provide. In particular, the requirements that agencies act based on public-regarding, non-animus-motivated reasons, and that they do so consistently according to those reasons, also apply to critical habitat exclusion decision making. Hence, a challenge to the decision here, where the economic impact is so stark and the biological benefit nonexistent, *see* 77 Fed.

Reg. at 35140-35141, should be judicially reviewable for abuse of discretion. *See* Jones dissent at 161a-162a.

3. Objections to Judicial Review Do Not Hold Up to Scrutiny

The lower court advanced two basic arguments against judicial review of the Service's decision not to exclude Unit 1 from critical habitat:

> (i) the ESA at § 4(b)(2) says that the Services "may" exclude but not "must" exclude (Pet. App. at 35a); and
>
> (ii) the ESA provides no "meaningful" or "substantive" standard by which to measure a decision not to exclude (*id.*).

Neither argument against judicial review is convincing, especially when confronted with the argument advanced by Justice Scalia in *Webster* and adopted here.

a. Permissive Language of §4(b)(2) Does Not Mean That Decisions Made Pursuant to That Power Are Unreviewable

That § 4(b)(2) is couched in permissive language does not mean that decisions made pursuant to that power are unreviewable. The APA's text commands a contrary conclusion. Indeed, the APA expressly allows for judicial review of discretionary decision making. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . an abuse of discretion . . . .").

Rather, a statute's use of the word "may" more likely denotes that a court's review of the agency's decision should be deferential. *Dickson v. Secretary of*

Defense, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (a statute's use of the word "may" "does not mean that the matter is committed exclusively to agency discretion" but instead that the "courts should accordingly show deference to the agency's determination" when reviewing it).

b. The ESA May Provide No "Meaningful" or "Substantive" Standard by Which To Measure a Decision Not To Exclude, But Both the Constitution and the APA Do

The ESA may give the Services wide discretion to establish the general rules and principles that will govern their exclusion decision making. *See* Ashutosh Bhagwat, *Three-Branch Monte*, 72 Notre Dame L. Rev. 157, 191 (1996) ("If . . . an agency formulates and consistently follows a particular enforcement policy, courts should be extremely deferential in reviewing the discretionary aspects of that policy regarding such matters as limited resources, as well as in reviewing the application of such discretionary factors to particular enforcement decisions."). But the agencies cannot depart from these guideposts on whim or fancy. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("[A]n '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'") (quoting *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). If they do, then courts should be allowed to step in—indeed, they *should* step in if they are going to fill the role our Founding Fathers gave them in the Constitution and Chief Justice Marshall recognized in *Marbury*. *See Marbury*

v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Here, the Service declined to exclude an area the designation of which would impose $34 million in costs. *See* 77 Fed. Reg. at 35140-41. The Service explained that it "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141. The Family Landowners and Weyerhaeuser should be allowed, upon remand, to demonstrate that the impacts of the designation of Unit 1 are—contrary to the Service's bare assertion—disproportionate. *See Michigan v. EPA*, 135 S. Ct. at 2707 (agency action that produces substantial costs with little or no benefit is "not . . . rational").

Contrary to the Fifth Circuit panel's decision, there are meaningful standards by which to adjudge a decision not to exclude critical habitat. Besides the APA standards identified above, the Constitution also provides a standard by which all agency action can be adjudged regardless of any particular standard unique to the agency action at issue. *See Webster*, 486 U.S. at 603-04 (majority opinion) (holding that the Constitution itself would provide a meaningful standard even when the statute itself does not).

Moreover, the fundamental principle of rational decision making,[9] which undergirds administrative

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[9] *See Michigan v. EPA*, 135 S. Ct. at 2707 (agency action that produces substantial costs with little or no benefit is "not . . . rational"); *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) ("If an agency takes action not based on neutral and rational principles, the APA

law, provides two meaningful standards that proceed from the underlying substantive statute: an agency (i) must articulate a rational connection between the facts found and the decision made, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 and (ii) must explain how its methodology rationally relates to the reality intended to be depicted. *Columbia Falls Aluminum Co. v. Environmental Prot. Agency*, 139 F.3d 914, 923 (D.C. Cir. 1998) (an agency's use of a model is arbitrary if the model bears no rational relationship to the on-the-ground facts). These standards can be applied even in the context of an entirely "discretionary" action— for example, assuming the Service truly had otherwise unfettered discretion to exclude or not to exclude a given parcel, surely it could not decline to exclude a parcel because of the race or religion of its owner?

Here, the Service irrationally declared Unit 1 critical habitat for a frog that biologically cannot benefit from the designation, regardless of the economic impact upon the Family Landowners and Weyerhaeuser. That irrational decision is reviewable under the APA and the Constitution, and this Court should say so.

B. The Lower Court's Decision Conflicts Plainly with *Bennett v. Spear*

And finally, the Court can avoid the *Heckler* test and its weaknesses as applied to the ESA by simply relying upon *Bennett v. Spear*, 520 U.S. 154 (1997).

In *Bennett*, the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory—not discretionary. There

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grants federal courts power to set aside the agency's action as 'arbitrary' or 'capricious.'").

the Service based its argument in favor of discretion on the permissive language of the Act: "[t]he Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* at 172 (quoting 16 U.S.C. § 1533(b)(2)). This Court rejected that argument, explaining that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical requirement that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C.§ 1533(b)(2)). *In other words, courts can review what the Service designates as critical habitat, and that reviewability should include the rationality of the economic implication of the decision not to exclude land from the designation.*

The lower court's decision holds otherwise. As Judge Jones explained: "The panel majority opinion clashes with *Bennett*'s holding that the Service's 'ultimate decision' is reviewable for abuse of discretion." Pet. App. at 161a. Reviewing the ultimate decision would necessarily include how the agency weighed the economics of excluding—or declining to exclude—a unit within a critical habitat designation.

The failure to reconcile the instant case with *Bennett* is particularly confounding because the economic impact was so severe upon the landowners, and the conservation benefit to the frog amounts to nil. The landowners faced up to $34 million in negative economic impact upon the landowners, with no economic benefit, or biological benefit, to the frog. The designation of Unit 1 does not and cannot benefit

the frog, yet the Service can designate Unit 1 and the landowners are without recourse to go to court. That cannot be right.

In this case, the Secretary ultimately decided: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35141. That decision should be reviewable in court, because it "runs counter to the evidence before the agency" and "is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43.

CONCLUSION

Scholars call the ESA the "pit bull" of environmental law. Jonathan H. Adler, *Introduction: Rebuilding the Ark, in Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* 1, 1 (Jonathan H. Adler ed., 2011); Joe Mann, *Making Sense of the Endangered Species Act: A Human-Centered Justification*, 7 N.Y.U. Envtl. L.J. 246, 250 (1999) ("In all of American environmental law, one would be hard-pressed to find another piece of legislation that establishes such an inflexible prioritization scheme as the ESA."). It may be a pit bull, but here the Service took the ESA and its critical habitat provisions off the leash Congress put on it with the 1978 Amendments. This Court should reverse.

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No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS MARKLE INTERESTS, LLC; P&F LUMBER COMPANY 2000, LLC; and PF MONROE PROPERTIES, LLC'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The U.S. Fish & Wildlife Service and Intervenors Center for Biological Diversity and the Gulf Restoration Network labor unsuccessfully to persuade that land that does not and cannot conserve the dusky gopher frog is nevertheless "critical habitat" for the frog. Intervenors further suggest that Weyerhaeuser Company (Weyerhaeuser) and Markle Interests, et al. (collectively, the Family Landowners), do not even have standing to contest this regulation of their property. But a plain application of this Court's standing jurisprudence and a textually-moored interpretation of the Endangered Species Act (ESA) expose the weaknesses of their arguments.

The land owned by the Family Landowners and Weyerhaeuser is neither habitat nor essential to conserve the frog. Indeed, all concede this land *cannot* presently conserve the frog. Additionally, this Court's pragmatic approach to judicial review of agency decision-making under the Administrative Procedure Act (APA) requires courts to review, albeit deferentially, the Service's decision not to exclude lands from critical habitat.

The Court should reverse.

ARGUMENT

I

FAMILY LANDOWNERS HAVE STANDING TO CHALLENGE THE DESIGNATION OF THEIR LAND AS CRITICAL HABITAT

"There is ordinarily little question" of standing when a suit is brought by "an object of the action (or forgone action) at issue." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The Family Landowners are the object of the Service's designation of their land as critical habitat for the dusky gopher frog. The designation is directed at their property in particular and restricts their plans to use the property. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967).

Intervenors—but not the Service—question Weyerhaeuser's and the Family Landowners' standing on ripeness grounds. Despite the critical habitat designation's status as final agency action, they argue that the Family Landowners must wait, suffer additional injuries caused by the critical habitat designation, and then belatedly litigate whether they should have been subjected to them in the first place. Intervenors' arguments do not merit consideration.

First, as the Fifth Circuit and district court correctly held, the critical habitat designation injures the Family Landowners because it reduces the value of their property. Pet. App. 13a; Pet. App. 98a-99a. The Service acknowledges "a property that is designated as critical habitat may have a lower market value" because "[p]ublic attitudes about the limits or restrictions that critical habitat may impose

can cause real economic effects to property owners." Pet. App. 13a. Intervenors may wish that markets reacted differently to critical habitat designations, but that does not make it so. Not only does the designation reduce the value of Family Landowners' property but this injury occurs immediately. As the Service acknowledges, "any reduction in land value due to the designation of critical habitat will happen immediately at the time of the designation." *Id.*[1]

Although this injury is sufficient to establish standing, the Court could also find standing on the alternative grounds that the critical habitat designation injures the Family Landowners by regulating their future use of the land. *See* March 12, 2012, Public Comment on Behalf of P&F Lumber (Pet. Jt. App. at JA60; *id.* at JA59). As the Service recognized, the Family Landowners "have invested a significant amount of time and dollars into their plans to develop this area[.]" Final Economic Analysis at 4-3 (¶ 73). The designation of their land as critical habitat will further increase their costs to use the land—by as much as $34 million—due to increased red tape and use restrictions. 77 Fed. Reg. 35,118, 35,140-41 (June 12, 2012). Intervenors assert that the precise dollar value of this injury will be easier to judge in hindsight, but this damage assessment does

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[1] *National Park Hospitality Association v. Department of Interior*, 538 U.S. 803 (2003), is inapposite. There, this Court held an interpretive regulation issued by an agency not charged with implementing the statute it was interpreting does not present a ripe controversy. That interpretive rule "d[id] not affect a concessioner's primary conduct" much less did it directly regulate it. *See id.* at 810. Here, by contrast, the agency charged with implementing the ESA issued a regulation that alters the regulatory regime governing the Family Landowners' property.

not defeat the Family Landowners' standing to challenge the designation. What matters for standing purposes is whether a plaintiff suffers some injury, not whether the injury is valued at $1 or $20 million. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"). Family Landowners have established standing based on lost property value and the burdens imposed on their plans to use the property.

Intervenors' argument that this claim is unripe because the precise extent of these injuries will depend, in part, on additional agency action fares no better. This Court has repeatedly rejected such arguments, most recently in *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016), and *Sackett v. EPA*, 566 U.S. 120 (2012). In both cases, this Court recognized a property owners' right to challenge agency actions that burdened their land, even though the full extent of those injuries would depend on subsequent agency action. *Hawkes*, 136 S. Ct. at 1813-16; *Sackett*, 566 U.S. at 124-27.

Intervenors' view of standing would unreasonably restrict judicial review under the APA. *Cf. Abbott Labs.*, 387 U.S. at 141 (discussing the strong presumption of judicial review under that statute). The Family Landowners and Weyerhaeuser have standing to challenge the designation.

II

THE ESA DOES NOT AUTHORIZE THE SERVICE'S DESIGNATION OF UNIT 1 AS CRITICAL HABITAT

A. Unit 1 Is Not "Habitat"

The Family Landowners' merits brief properly argues the Service cannot designate Unit 1 *critical habitat* under the ESA because it is not *habitat* for the frog at all. *See* Respondents' Br. on the Merits at 21, 26-28. The Service and the Intervenors fail to refute this argument. The Service may designate only "habitat" as critical habitat. 16 U.S.C. § 1533(a)(3)(A)(i). While the ESA does not define "habitat," the ordinary dictionary meaning of the term is "the place where a particular species of animal or plant is normally found." Habitat, Black's Law Dictionary (10th ed. 2014). Absent the features essential for a species to survive in a given place or area, land cannot be considered habitat or designated as critical habitat.

The Service fails to rebut this ordinary reading of the ESA. Instead, it claims that "habitat" must be read at least in part to mean an area in which a species would *not* normally be found or even survive without significant change to the area. But the Service fails to demonstrate how this interpretation of "habitat" is consistent with the text of the ESA. The text of the ESA, rather, requires any area designated as critical habitat to "contain the features essential for species conservation." The prior critical habitat designations the Service proffers are generally consistent with the ordinary definition of "habitat," but *inconsistent* with Unit 1 in this case. The ESA

allows designation of areas only when they are presently and actually habitat; neither past occupation nor remotely possible future habitability suffices to designate areas that are not presently actual habitat.

1. The ESA Cannot Be Read, as the Service Insists, To Mean That "Habitat" Includes Areas That Cannot Support a Species

The Service makes the argument that the ESA requires that "habitat" not necessarily be habitable. This is so, the Service says, because the ESA defines two kinds of critical habitat, occupied and unoccupied, and references the "features essential to conservation" only in connection with occupied habitat. Service Br. at 22-24. Under this reading, if all habitat is required to be habitable, *i.e.*, to have the "essential features," then the specification that occupied habitat have the "essential features" would be redundant. But this superficial reading of Section 1532(5)(A) wrongly divides Section 1532(5)(A) into sub-definitions, one for "occupied critical habitat" with one set of criteria applicable only to occupied areas, and another for "unoccupied critical habitat," with only a lone criterion. In the Service's reading, Section 1532(5)(A)(i) and (ii) are distinct and unconnected universes, unrelated to each other textually or structurally. This is wrong.

a. Section 1532(5)(A) Provides a Single Definition of "Critical Habitat" Whose Criteria Are Cumulative, Not Alternative to Each Other

The Service may designate "habitat" as "critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i). The ESA defines "critical habitat" in one provision of the code, which lists cumulative requirements for designation, the first two of which apply to occupied areas, and *all three* of which apply to unoccupied areas. 16 U.S.C. § 1532(5)(A)(i)-(ii). In other words, the criteria applicable to occupied areas under Section 1532(5)(A)(i) are also applicable to unoccupied areas. The ESA's structure and text demonstrate this. *See, e.g., Dean v. United States*, 556 U.S. 568, 577 (2009) (clear meaning of statute determined from text and structure).

Section 1532(5)(A) is a single definition of "critical habitat," not two separate definitions of occupied and unoccupied critical habitat. This structure requires that the definition be read as a whole, with subdivisions (i) and (ii) as *cumulative* rather than alternative requirements. Therefore, the requirements of (i), that the area contain "features" that are (1) "essential to [species] conservation" and (2) "require special management," apply to *all* critical habitat designations.[2] The Service must meet only

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[2] The Service incorrectly claims that requiring occupied critical habitat to have the "essential features" would be redundant if all critical habitat must have the "essential features." The presence of the essential features is only one of the two criteria included in (i). The other is that the features "require special management." There is a strong textual connection between the dictionary definition of "habitat" and the "essential features" provision of Section 1532(5)(A). Instead of being redundant, the

these two criteria for an occupied area. 16 U.S.C. § 1532(5)(A)(i). If the area is unoccupied, the additional criterion—that the area be essential for species conservation—applies and limits the Service's discretion. 16 U.S.C. § 1532(5)(A)(ii).

The connection of (i) and (ii) with "and" instead of "or" reinforces this reading. "Critical habitat" includes *both* occupied areas and unoccupied areas that meet the applicable criteria. If the criteria of (i) and (ii) were alternative instead of cumulative, they would not be joined with "and" but with "or." *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) ("or" is "almost always disjunctive.") (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)).

Reading Section 1532(5)(A) the Service's way, as two mutually exclusive "subdefinitions," would misread the statute. It would allow that a given unoccupied area could lack the "features essential to species conservation" (*i.e.*, the species could not be conserved in that area) and yet somehow be "essential for species conservation" (*i.e.*, the species could not be conserved without the area). If an area cannot support

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"essential features" criterion is merely the minimal assurance that the designated area is, in fact, habitat. Section 1532(5)(A)(i) further provides that the "essential features" "require special management" and (ii) includes the additional requirement, applicable only to unoccupied areas, that the area be "essential for species conservation." Read this way, the "essential features" criterion applies to all areas designated, and is, therefore, not redundant. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011) ("the rule against giving a portion of a text an interpretation which renders it superfluous does not prescribe that a passage which could have been more terse does not mean what it says.").

a species, it cannot be essential to its conservation; no interpretation of the ESA which produces this result can be reasonable.

In the event of any ambiguity, the legislative history also confirms the reading that (i) and (ii) are cumulative, not alternative. *See* Respondents' Br. on the Merits at 32-36. Congress clearly intended that it be *more* difficult for the Service to designate unoccupied areas as critical habitat. The best reading of Section 1532(5)(A) to give effect to that intent is that Sections 1532(5)(A)(i) and (ii) establish cumulative criteria for designation. All critical habitat must have the "features" which are (I) "essential to conservation" and (II) "require special management." If unoccupied areas are to be designated, they must further be "essential for conservation." In this way, (ii) serves as a limiting and narrowing criteria, allowing occupied habitat to be designated upon meeting fewer criteria, and preventing designation of unoccupied habitat that does not meet both the basic criteria of (i) and the additional criterion of (ii).

b. The Service's Occasional Practice of Designating Incomplete Habitat Does Not Rescue Its Illegal Designation of Unit 1

The Service cites two cases as examples of designated critical habitat containing fewer than all of the essential features for conservation. But these examples support the Family Landowners' reading of "habitat." Neither case involves designations like Unit 1—an unoccupied area unconnected from or unrelated to additional areas that provide the remaining essential features for the balance of a species' life cycle.

Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Service, 616 F.3d 983, 988 (9th Cir. 2010), does not support the Service in this case. The question in *Home Builders* was whether vernal pools and their immediate surrounding areas could be designated as occupied critical habitat, where the pools themselves contained most but not all of the primary constituent elements (PCEs) for the species. The Ninth Circuit held that since the two portions of the designation *together* provided all four PCEs necessary for the habitat, the ESA did not require that both portions of the designated area supply all of the PCEs independently of the other.

In this case, on the other hand, the entirety of Unit 1—even if combined with immediately surrounding areas—lacks the complete set of PCEs for the frog. The Service concedes Unit 1 is far too remote from the other units or any other habitat to be considered connected with them in the sense that the vernal pools and immediate upland areas were in *Home Builders*. *Accord Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977, 983-84 (9th Cir. 2015) (designation of aquatic areas immediately adjacent to occupied fish habitat, where designated areas supplied water and sediment as a PCE).

Simply put, an area cannot be "essential to a species conservation" without consideration of the likelihood of whether it will contribute to that conservation at all. In the neighboring habitat examples upon which the Service relies—*Home Builders* and *Bear Valley*—that likelihood is clear. Here, on the other hand, it is exceedingly unlikely that the designation will ever conserve the frog—so how could it ever be considered *essential* for that

conservation? The Service has recognized this logic elsewhere if not here; it has in fact recently proposed to amend its Regulations for Listing Species and Designating Critical Habitat to adopt this very logic. *See* 83 Fed. Reg. 35,193, 35,198 (July 25, 2018) ("In order for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species.").

2. The Service Does Not Offer a Definition of Habitat and Is Not Entitled To Deference

More importantly, the Service's purported "interpretation" of "habitat" is not a definition. It is, rather, an example of the Service's *ad hoc* application of the statute—a practice which involves different interpretations in each case, as the Service concedes. It is no more than a description of the Service's practice of designating critical habitat in an *ad hoc*—and occasionally inconsistent—manner and its preference to continue doing so. The Service's effort to tease a definition from some of its disparate applications of the statute is really nothing more than a litigation position, which is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[3] Indeed, the Service's assertion that by determining critical

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[3] *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 708 (1995) is no help to the Service here. *Sweet Home Chapter* afforded *Chevron* deference to the Service's regulatory definition of "harm," but does not stand for the proposition that any and all of the Service's definitions under the ESA are entitled to deference.

habitat in this case (or any case) it has also defined it, for this case or on a case-by-case basis, is inconsistent with any accepted notion of a regulatory definition of a statutory term, whether entitled to deference or not.

The Service's position boils down to nothing more than "critical habitat is what we say it is." No objective, enforceable criteria that a court could apply to this or any future designation can be gleaned from the critical habitat designations identified by the Service. Absent any such principle, it does not serve the purpose of a definition. This Court has never afforded *Chevron* deference to such an unprincipled and circular position and should not start today.

3. The ESA Limits the Service to Designation of Areas That Are Critical Habitat When They Are Designated

The ESA defines the required characteristics of critical habitat in the present tense. *See* 16 U.S.C. § 1532(5)(A)(i) ("on which *are* found those . . . features . . . essential to the conservation of the species"); *id.* § 1532(5)(A)(ii) ("determination . . . that such areas *are* essential for the conservation of the species."). Congress's textual choice cuts against the Service's strained effort to say the existence of the frog on Unit 1 decades ago, or at some speculative time in the future, fits the statute. *See Scarborough v. United States*, 431 U.S. 563, 570 (1977) ("It is obvious that the tenses used through Title IV were chosen with care."); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) ("We think the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed.").

The ESA also defines the required characteristics as actually present ("are") rather than potentially or contingently present, which would be signified by "may be" or "could be." The use of conditional criteria is seen elsewhere within the ESA. *See, e.g.*, 16 U.S.C. § 1533(f)(1)(A) ("species that are, *or may be*, in conflict with construction or other development projects."); *see also id.* § 1361(a) ("certain species and population stocks of marine mammals are, or *may be*, in danger of extinction"). The use of "are" in Section 1532(5)(A), alongside the conditional "are, or may be" in the very next section, 16 U.S.C. § 1533(f)(1)(A), requires that the critical habitat definition be read to exclude areas that "may be" able to meet the criteria. *Nat'l Assoc. of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The Service's assertions that Unit 1 might be habitat, conditionally (if the landowners change their minds and dedicate significant money and effort to establish functional habitat on their property) and in the future (*i.e.*, after the condition is met), are not germane to whether the Service can designate Unit 1 *now*, because the ESA allows the Service to designate only those areas that meet the criteria at the time of designation.

B. Unit 1 Is Not "Essential" for Species Conservation Because It Is Not Even Adequate for Species Conservation

The Service argues that it should be able to designate Unit 1 as critical habitat because it is the closest thing to actual habitat for the frog in Louisiana. But that consideration does not render Unit 1 "essential" for the frog. The Service points to no textual evidence in Section 1532(5)(A), or elsewhere in the ESA, to indicate that "essential" means anything other than "cannot be conserved without it." Since Unit 1 lacks the "features essential for species conservation," the species cannot be conserved *with* it. This is not a reasonable interpretation of the ESA, and well outside the bounds of *Chevron* deference.

The balance of the Service and Intervenors' arguments on essentiality boils down to the proposition that absent areas that actually qualify as unoccupied critical habitat, the Service should be able to designate what it considers the next best thing, even if it falls far short of being minimally adequate. But the good intentions of an agency to supply what Congress has not provided do not amount to legal authority to do so. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460-61 (D.C. Cir. 2017) ("However much we might sympathize or agree with EPA's policy objectives, EPA may only act within the boundaries of its statutory authority.").

III

APA AND ESA ALLOW FOR JUDICIAL REVIEW OF THE SERVICE'S DECISION NOT TO EXCLUDE UNIT 1 FROM CRITICAL HABITAT

Section 4(b)(2) of the ESA authorizes the exclusion of areas from a species' critical habitat if the benefits of exclusion would outweigh the benefits of inclusion, provided that the exclusion would not result in the species' extinction. 16 U.S.C. § 1533(b)(2). The Service and the Intervenors argue that a decision not to exclude an area is immune from judicial review, because a court would have no "meaningful standard" and "no law to apply" in reviewing the decision, which therefore must be "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). To support the case against judicial review, they focus principally on how the ESA provides, without elaboration, that the Service "may" but not must exclude any area. This focus is misplaced.

A. The Service and Intervenors Ignore the Text of the APA When They Argue in Favor of Unreviewability of the Decision Not To Exclude Unit 1 from the Designation

To begin with, an exclusive attention to the word "may" would render idle the allowance for "abuse of discretion" review in the APA, 5 U.S.C. § 706(2)(A), because the grant of any discretion—*i.e.*, a "may" clause—would necessarily mean that the agency action is committed to agency discretion by law.[4] *See*

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[4] To be sure, judicial review of the statutory predicates for § 4(b)(2) discretion—that the benefits of exclusion outweigh the

Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum. L. Rev. 55, 58-61 (1965). Further, the "no meaningful standard" and "no law to apply" rules are not tied to a particular clause of a statute. Instead, they inquire as to whether *any* rule of decision, whatever its source, exists for judicial resolution of a given controversy. *See* Kenneth Culp Davis, *"No Law To Apply"*, 25 San Diego L. Rev. 1, 4 (1988) (observing that the "no law to apply" standard "does not mean that reviewability requires a *statute* that provides a 'meaningful standard'"), *cited in* Br. Amici Curiae of Nat'l Ass'n of Home Builders, *et al.*, at 16 n.6. Thus here, it does not matter if the ESA lacks a specific standard to review a decision not to exclude under § 4(b)(2), because other sources of standards—such as the Constitution or the agency itself—can afford such a measure. Finally, a statute-specific approach for applying the "committed to agency discretion by law" exception would be particularly inappropriate, given the separate exception in the APA for "statutes that preclude judicial review." 5 U.S.C. § 701(a)(1). Congress would have had no reason to provide two distinct carve-outs to the APA's otherwise generous allowance for judicial review if both depended on whether the particular statute at issue precluded (by intent or design) such review.

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benefits of inclusion and that an exclusion would not lead to the species' extinction—would be available even under the Service's crabbed understanding of reviewability. That conclusion follows, however, not because such predicates pertain to the Service's discretion, but rather because an exclusion in their absence would implicate the APA's distinct allowance for judicial review of agency action "in excess of statutory . . . authority." 5 U.S.C. § 706(2)(C). For an agency cannot abuse a discretion that it does not have.

B. Neither the ESA's Text Nor Its Legislative History Supports the Arguments That the Decision Not To Exclude Is Unreviewable

Contrary to the Service's and the Intervenors' accounts, the argument against judicial review of § 4(b)(2) decision-making finds no support in the provision's statutory or legislative history. The original Endangered Species Act of 1973 lacked a definition of or process for designating critical habitat. *See* Pub. L. No. 93-205, §§ 1-17, 87 Stat. 884, 884-903 (1973). In 1978, the Court ruled in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (*TVA*), that the ESA required the preservation of endangered species (and, in *TVA*, the snail darter's critical habitat) "whatever the cost." *Id.* at 184. Responding swiftly to the decision, Congress amended the ESA in relevant part to require the Service to consider economic and other non-biological factors when designating critical habitat, and to authorize the agency to exclude areas from such habitat on account of excessive economic or other non-biological impacts. Pub. L. No. 95-632, §11(7), 92 Stat. 3751, 3766 (1978). Thus, far from supporting congressional intent, a construction of the "committed to agency discretion by law" bar that precludes review of the Service's § 4(b)(2) authority would thwart the 1978 Amendments' aim of "introducing some flexibility which will permit exemptions from the Act's stringent requirements." H.R. Rep. No. 95-1625, at 14 (1978).[5]

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[5] Although the House Report for the 1978 Amendments states that the Service's weighing of competing factors when designating critical habitat is discretionary, H.R. Rep. No. 95-1625, at 17, nothing in the Amendments' legislative history

C. Properly Allowing for Judicial Review Here Does Not Run Afoul of *TVA v. Hill*

For their part, Intervenors contend that judicial review of exclusion decision-making would run afoul of *TVA*'s admonition that federal courts "have no expert knowledge on the subject of endangered species, much less do [they] have a mandate from the people to strike a balance of equities on the side [of development]." *TVA*, 437 U.S. at 194. The Court's warning has no bearing here. In *TVA*, there was little question that the statute as then written required a "whatever the cost" result. *Id.* ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities."). *See* H.R. Rep. No. 95-1625, at 10 ("As the Act is currently written, . . . [t]he Secretary has no discretion to alter a critical habitat designation on the basis of the effect that such designation may have on the area."). Hence, the critical issue presented for decision was whether, *notwithstanding* the statute's plain command, a federal court could use its equitable discretion to fashion "a remedy 'that accords with some modicum of common sense and the public weal.'" *TVA*, 437 U.S. at 194 (quoting *id.* at 196 (Powell, J., dissenting)). In contrast here, allowing judicial review of exclusion decision-making would not invite the judiciary, in the face of a contrary congressional command, to weigh the benefits of endangered species protection with countervailing economic or other concerns. Instead, the courts would

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suggests that § 4(b)(2) gives the Service the discretion to act invidiously or irrationally.

merely review—with appropriate deference—the Service's exercise of a power that Congress has explicitly granted.[6] *Cf.* Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. Chi. L. Rev. 935, 939-40, 981 (2018) (arguing that agency cost-benefit analysis actually facilitates judicial review, and that courts "can . . . contribute to administrative rationality by correcting valuation errors that regulatory agencies commit and demanding that agencies offer explanations for their valuations that go beyond boilerplate").

D. Contrary to the Service's Arguments, the Service Has Developed Meaningful Standards for the Court To Apply When Reviewing Its Decision Not To Exclude Property from a Critical Habitat Designation

The Service resists even minimal judicial scrutiny, quibbling over the thrust of Justice Scalia's dissent in *Webster v. Doe*, 486 U.S. 592 (1988), Service Br. at 49 n.12, but the distinction the agency draws is beside the point. That instances may occur in which a court would truly have no law to apply, and thus no meaningful standard and no basis to review an agency's decision-making, is irrelevant. What *is*

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[6] Relatedly, Intervenors contend the 1978 Amendments merely directed the Service to incorporate economic considerations into its decision-making in the manner of the National Environmental Policy Act (NEPA)—namely, all procedure and no substance. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The analogy to NEPA is inapt since § 4(b)(2) is not all procedure; in addition to the consideration of economic impacts as part of the designation process, the provision affords a substantive power to alter the outcome of that process. There is nothing parallel to that in NEPA. *See id.* at 351.

relevant is that such instances should be quite few in number, owing to the availability of meaningful standards like the basic constitutional requirements of public-regarding and reasoned decision-making.[7] *See Webster*, 486 U.S. at 608 (Scalia, J., dissenting) ("[T]here is no governmental decision that is not subject to a fair number of legal constraints precise enough to be susceptible of judicial application—beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest."). *See also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (due process is violated by "the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . ."). And as with most agency action, the Service's § 4(b)(2) decision-making can be effectively tested by judicial employment of just such standards.

But even if that were not so, judicial review would still be workable in this case because the Service itself has articulated a meaningful standard. *See INS v. Yang*, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows . . . a general policy by which its exercise of discretion will be governed, an irrational departure from that policy . . . could

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[7] Another reason the number should be small is the constitutional mandate that all legislative grants of authority must contain an "intelligible principle" to guide the exercise of the granted power. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) ("Congress must lay down by legislative act an intelligible principle, and the agency must follow it.") (internal quotation marks removed). There is thus no reason why courts could not review agency action for, at the very least, conformity with the required intelligible principle.

constitute action [judicially reviewable under] the Administrative Procedure Act . . . ."), *cited in* Service Br. at 48. In denying an exclusion for Unit 1, the Service explained that it could not identify any "disproportionate costs."[8] JA190. Why then should a court not be allowed to review, under an appropriately deferential standard,[9] the Service's decision by the agency's own measure of "disproportionate costs"?[10]

Perhaps the Service seeks so assiduously to avoid review because, should it occur, the agency

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[8] Although not codified in regulation, the Service regularly employs the "disproportionate costs" standard in critical habitat designations. *See, e.g.*, 81 Fed. Reg. 59,046, 59,087 (Aug. 26, 2016) (various California amphibians); 81 Fed. Reg. 14,264, 14,307 (Mar. 16, 2016) (New Mexico meadow jumping mouse); 81 Fed. Reg. 3866, 3883 (Jan. 22, 2016) (two Florida plants); 79 Fed. Reg. 54,635, 54,645 (Sept. 12, 2014) (Georgia rockcress).

[9] Several former officials of the Department of Interior argue, as Amici, that the Service's exclusion decision-making is so complex that judicial review would necessarily be inappropriate. Br. of Am. Curiae Former Dep't of Interior Officials, at 17-19. But federal courts routinely review complex agency rule-making. Moreover, any advantage agencies may have over judges in resolving technical or scientific disputes is taken account of by the APA's deferential standards of review. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

[10] The Service's Amici contend that a focus on disproportionate costs mischaracterizes the agency's economic analysis which, properly understood, was merely "inconclusive as to whether benefits outweigh costs or vice versa." Am. Curiae Br. of Economists & Law Profs., at 5. That, however, is not how the Service understood its own analysis, *see* JA190, and the agency's reliance on a *post hoc* alternative rationale would be impermissible. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962).

would have quite a time defending its decision.[11] The economic impact to Unit 1 far exceeds that to any other Unit; in fact, the difference between Unit 1's impact and that of the next most affected Unit is *three orders of magnitude*. *See* JA75. And the Service would fare no better if its "no disproportionate costs" judgment were construed to mean that the costs to Unit 1 were not too much greater than the benefits to Unit 1. The Service did not even attempt to quantify the designation's benefits and, under any reasonable reckoning, a negative impact of millions of dollars versus an unknown but likely trifling benefit (given the marginal value of Unit 1's habitat) approaches the extreme cost-benefit disproportion that is a hallmark of administrative irrationality.[12] *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("One would not say that it is . . . rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.").

The Service has wide discretion in assessing economic impact, and wide discretion in determining whether to exclude an area on account of economic or other impact. But the process that Congress

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[11] Intervenors think otherwise, pointing out that, per *TVA*, Congress has assigned endangered species an incalculable value. Intervenors Br. at 57. But if that were truly so, then no exclusion could ever be justified and § 4(b)(2)'s authorization would be rendered idle.

[12] The Service's Amici emphasize the ancillary benefits of critical habitat designation. *See, e.g.*, Am. Curiae Br. of Inst. for Policy Integrity, at 7. Even assuming their relevance, such benefits cannot rationally be weighed against the benefits of exclusion from critical habitat unless the two sets of benefits are commensurable, and the Service did not quantify those benefits, even while admitting that such quantification is possible. *See* JA 95-98.

established for exclusion decision-making is not a lawless one. The Service's § 4(b)(2) decision-making should be subject to review for invidiousness[13] and irrationality.

CONCLUSION

The Service slipped loose the textual restraints of the ESA when it designated Unit 1 critical habitat for the dusky gopher frog. Therefore, this Court should reverse the Fifth Circuit's decision to affirm the designation of Unit 1 as critical habitat. Further, it should hold that the courts may review the Service's decisions not to exclude property from a critical habitat designation.

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[13] Intervenors contend that invidious § 4(b)(2) decision-making is already reviewable because (i) it does not concern economic impact and (ii) exclusion decision-making is just one component of the entire process of designating critical habitat. *See* Intervenors Br. at 57-58. As for (i), it would be passing strange to deny review for the very thing—economic impact—that precipitated § 4(b)(2)'s enactment. As for (ii), § 4(b)(2)'s text makes clear that exclusion decision-making is separate from the designation of critical habitat: whereas its first sentence sets forth what must be done when the Service "designate[s] critical habitat," its second sentence gives the Service authority to exclude any area from "critical habitat," *i.e.*, habitat already designated as critical, not potential or inchoate critical habitat. Notably, the Service itself views the exclusion process as separate from the designation process. *See* Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7226, 7227 (Feb. 11, 2016) ("The second sentence of section 4(b)(2) outlines a separate, discretionary process . . . .").

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No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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66 Fed. Reg. 62993 (Dec. 4, 2001) 1

76 Fed. Reg. 59774 (Sept. 27, 2011) 2

77 Fed. Reg. 35118 (June 12, 2012) ..... *passim*

83 Fed. Reg. 35193 (July 25, 2018) 9

Other Authorities

OXFORD ENGLISH DICTIONARY (2d ed. 1989) 5

S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1978, 1979, AND 1980 (Comm. Print 1982) 11

Charles Schwarz, *et al.*, USDA Forest Service, *Wildland Planning Glossary* (1976) 4

U.S. Fish and Wildlife Service, *Habitat Conservation Planning Handbook* (Dec. 2016) 4

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) 4

REPLY BRIEF

I. The Administrative Record Demonstrates That Unit 1 Is Not Habitable.

Although the Government plays fast and loose with the facts, this is an APA case limited to the administrative record. Petitioner merely asks this Court to credit the Service's own findings published in the Federal Register, which conclusively establish that Unit 1 is not habitable.

FWS "determined" the "physical or biological features" that the "frog requires." JA144. In addition to breeding ponds, it requires "[u]pland forested nonbreeding habitat" "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover" and "underground habitat" that the "frog depends upon for food, shelter, and protection." JA153. The frog also requires "connectivity habitat" "characterized by an open canopy." JA153-154. These "habitat characteristics [are] required to sustain the species' life-history processes." JA152-153. The Government's brief ignores open canopies, which "maint[ain]" the frog's "food source." JA149. And it says (at 24) that fires create "[o]ptimal" habitat, when FWS in fact found that "fire is the only known management tool" that "maintain[s]" "suitable habitat." 66 Fed. Reg. 62993, 62999 (Dec. 4, 2001); see CBD Br. 6-7 (explaining importance of open canopies and fires).

FWS found that the frog is "endemic to the longleaf pine ecosystem" and endangered "[d]ue to fragmentation and *destruction of habitat*." JA144, JA148 (emphasis added). "Longleaf pine forest habitat" has been "replaced with dense pine plantations, agriculture, and urban areas." 66 Fed. Reg. 62995. Those "habitat changes" are "unsuitable" for the frog. *Ibid.* In particular, "habitat" "conver[sion] to pine

(often loblolly * * *) plantations" creates "closed-canopy forest unsuitable as habitat." JA145.

FWS's findings thus make clear that the frog cannot inhabit Unit 1's dense, closed-canopy, fire-suppressed loblolly commercial forests.[1] Indeed, FWS found that "[a]ll" areas designated as critical habitat for the dusky gopher frog contain the "elements to support all the life-history functions essential for the conservation of the species *with the exception of Unit 1*." 76 Fed. Reg. 59774, 59780 (Sept. 27, 2011) (emphasis added).[2]

The Service did find that Unit 1 is "restorable" to habitat "with reasonable effort." JA167. FWS's two "scenarios" in which Unit 1 has a federal nexus expose what FWS had in mind. FWS would require the landowners to cough up "60 percent" of Unit 1 to be "managed" as a frog "refuge" in exchange for the privilege to "develo[p]" the other "40 percent"; or FWS would decree that "no development occur" at all. JA68-

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[1] Petitioner has consistently maintained that Unit 1 is not frog habitat. C.A. Reply Br. 18 ("Unit 1" cannot "be called 'habitat'" because it is "not actually habitable"); D.Ct. Mem. 14 (Dkt. 67-1) ("there is no conceivable logic under which Unit 1 can be considered 'habitat'"); AR1826 (Unit 1 contains no "elements of [frog] habitat"). Petitioner certainly "dispute[s]" that "adult frogs could live" in Unit 1. U.S. Br. 21. Mere "stump holes" (*ibid.*) are not habitat. JA152-154. The Fifth Circuit understood that petitioner made this argument—see Pet. App. 21a (appellants "argue that the Service 'exceeded its statutory authority' under the ESA" "because Unit 1 is not currently habitable")—and ruled upon it. *Id.* at 23a ("There is no habitability requirement in the text of the ESA").

[2] The Government (at 10, 19-20) selectively quotes Dr. Pechmann to suggest that he regarded Unit 1 as habitat. Fairly read, Pechmann's view was that Unit 1 "could be restored to suitable upland habitat." JA14. In any event, FWS's findings control.

69, JA125, JA189. FWS calculated lost development value at $20.4 to $33.9 million. JA189.

Even then, frog habitat would need to be created. The Government acknowledges (at 36 n.7) that ripping out loblolly forests, ending timber operations, planting longleaf pines, and managing them with frequent fires is not "reasonable effort," but "wholesale transformation." It claims FWS "nowhere indicated" that those efforts would be necessary. *Ibid.* But that is the only way the species could be established in Unit 1. Unsurprisingly, therefore, FWS did *not* respond to landowner comments that "Unit 1 will never have PCEs" because "timber management" on the property "precludes burning or planting longleaf pine trees" by saying that replanting and burning would be unnecessary. JA121-123. FWS said instead that "PCEs" were not needed for designation, Unit 1 has ponds, and "funding to private landowners for habitat management" might be available. *Ibid.*

That half-answer confirms what the Service's findings about the frog's life-needs already show: transforming Unit 1 into fire-managed "longleaf pine savannahs" (JA23) would be necessary to create habitat. And that is a massive undertaking, not a matter of a few "holes or stumps." U.S. Br. 36 n.7; see AR3080 (FWS field notes: Unit 1's "[u]plands" "[n]ee[d] fire [and] management"); CBD Br. 26 (frog has survived through "intense human effort" and "extensive habitat restoration").

For good reason, then, each Fifth Circuit opinion acknowledged that it is "undisputed" that Unit 1 is uninhabitable by the frog. Pet. App. 49a (Owen, J., dissenting). See *id.* at 24a (majority) (FWS "*found* that the *currently uninhabitable* Unit 1 was essential" for frog conservation) (emphasis added); *id.* at 131a (Jones, J., dissenting from denial of rehearing en banc)

("[n]o one disputes that the dusky gopher frog cannot inhabit Unit 1"). Unit 1 cannot "sustain a dusky gopher frog population" without "significant transformation and then, annual maintenance." *Id.* at 49a (Owen, J.).

II. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

Given the Service's findings, its designation of Unit 1 as critical habitat is arbitrary and capricious and not in accordance with law.

A. The designation violates ESA Section 4(a)(3), which, the Government now concedes, unambiguously limits designations to the species' "habitat." See U.S. Br. 23 (this provision "contemplates that a species' 'critical habitat' is part of its 'habitat'").

The Government observes (at 25) that the ESA does not define "habitat." But lack of a statutory definition does not automatically trigger deference. *E.g.*, *SWANCC*, 531 U.S. at 172, 174. This Court instead construes undefined terms based on their "ordinary or natural meaning." *F.D.I.C.* v. *Meyer*, 510 U.S. 471, 476 (1994). That principle resolves this case.

The Government admits (at 32-33) that Unit 1 is not "habitat" under the dictionary definitions we cited (Pet. Br. 23), which require "habitat" to be habitable. *E.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) ("the place where a plant or animal species naturally lives and grows," with the "physical features" that are "naturally or normally preferred" by a species).

The Government is silent about the Forest Service's contemporaneous definition as a place "where all essentials for [a species'] development and existence are present." It is silent about FWS's definition in its *Habitat Conservation Planning Handbook*, which is focused on the "particular environmental conditions"

where an "animal lives." And it never mentions the definitions used in international conventions. *E.g.*, Convention on Biological Diversity, art. 2 (1992) ("the place or type of site where an organism or population naturally occurs"). See Pet. Br. 23-24 (discussing these and other definitions). Yet these sources all define "habitat" in terms of habitability.

The Government (at 33) points to other dictionary definitions of "habitat" that it asserts cover Unit 1. But they do not. Unit 1 lacks the "'physical features'" "'naturally or normally preferred'" by the frog (*ibid.*)—the "fire-maintained, open-canopied, pine woodlands" where they "spend most of their lives." JA144-145. Unit 1 cannot "'natural[ly]'" sustain the "'life and growth'" of the frog (U.S. Br. 33), because it lacks "features" needed to "support the life-history processes of the species." JA154. It is not "the kind of locality" where the frog "naturally grows or lives." U.S. Br. 33 (citing OXFORD ENGLISH DICTIONARY 995 (2d ed. 1989)).

The Government's non-dictionary definitions are no better a fit. The Government observes (at 26-27) that habitat can be "degraded." But Section 4 is plain that "habitat" also can be "destr[oyed]." 16 U.S.C. § 1533(a)(1)(A). At that point, the Act does not "apply" to that land at all. *Hill*, 437 U.S. at 186 n.32.[3] As FWS found, the frog is endangered because of "destruction of habitat," including conversion to loblolly pine plantations that make land "unsuitable as habitat." JA145, JA148. Unit 1 is a loblolly plantation, the frog has not lived there since before the ESA's enactment,

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[3] In accusing petitioner of misinterpreting *Hill*, CBD (at 47 n.19) does not even try to explain footnote 32 of *Hill*, which stands for the proposition that once a species' "habitat [is] destroyed," the Act has "no subject matter to which it might apply." The Government does not contest our reading.

and Unit 1 is "unoccupied" by the frog though its ponds are supposedly "little changed"—the clearest indicators that Unit 1 is not habitat. JA160, JA162.

FWS did not designate Unit 1 so that frogs could use it "seasonally or for one purpose." U.S. Br. 29. It designated Unit 1 in the "hope" that "habitat" could be "restor[ed]" and the frog "translocated" there. JA123, JA167. It accordingly designated not only Unit 1's ponds, but also the 1544 acres around them, because the frog needs nonbreeding habitat and the "breeding and nonbreeding habitat" must be "connect[ed]." JA148. Indeed, there would be no purpose in designating Unit 1 only for its breeding ponds, when successful breeding occurs in zoos and even cattle tanks, and when, after breeding, frogs would have nowhere to go and nothing to eat because Unit 1 provides no habitat for their other life processes.

The designation of Unit 1 is nothing like "migratory" or "marginal" habitat that a species uses *en route* or now and then. U.S. Br. 26-27, 29. Nothing in Section 4's authorization to "designate any habitat" permits designation of *non*-habitat for a *non*-migratory species like the frog. 16 U.S.C. § 1533(a)(3)(A)(i).[4]

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[4] The Government argues (at 27) that "habitat" includes unoccupied areas "surrounding" where "a species is found" that "provide elements necessary to maintain the species." That was the context in which petitioner stated below that FWS could protect some unoccupied areas that lack essential features. C.A. Br. 28-29; see U.S. Br. 37 n.8; CBD Br. 42-43. But, *first*, areas of that sort are not at issue here. Unit 1 does not sustain frog habitat in Mississippi, and even if the frog were introduced into Unit 1's ponds, the surrounding uplands do not supply the features the frog needs to survive. *Second*, Judge Jones explained how, though surrounding areas that supply elements necessary for species survival that are not "habitat" cannot be designated "critical habitat," they may still receive other ESA protections. See Pet.

Ultimately, the Government's "case-by-case application" (at 25) defines "habitat" so amorphously that no land falls outside its scope. As in *Hill*, this Court should reject that "Humpty Dumpty" approach in which a word "means just what [the Government] choose[s] it to mean." 437 U.S. at 173 n.18. Under any plausible definition, uninhabitable Unit 1 is not "habitat" and so FWS may not designate it as "critical habitat."

B. The Government fares no better with statutory context. Section 3 defines "critical habitat" to mean "occupied" "areas" that contain "features" "essential to the conservation of the species" "which may require special management considerations or protection," and unoccupied "areas" that "are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A). The Government (at 28) is correct that "an 'area' may qualify as 'habitat' even if it is 'outside the geographical area occupied by the species.'" But the Government reaches too far in concluding that FWS may designate an area that "does not currently contain the 'physical or biological features' of *occupied* critical habitat." *Ibid.*

The Government overlooks the word "habitat" in Section 4(a)(3) and in the term "critical habitat." See Pet. Br. 22-26. Its interpretation also contradicts Section 3(5)(C), which provides that "critical habitat" generally "shall not include the entire geographical area which *can be occupied*" by the species. 16 U.S.C. § 1532(5)(C) (emphasis added). Section 3(5)(C) shows that Congress intended occupied *and* unoccupied

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App. 140a-141a ("the 'action' targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat").

"critical habitat" to be limited to areas that "can be occupied"—*i.e.*, *now*. See Pet. Br. 26-27. The Government would render Section 3(5)(C)'s limitation a dead letter by defining critical habitat to include areas that "can be occupied" only if new habitat is created. Because it cannot account for Section 3(5)(C), the Government (at 24) buries it in an unexplained "see also" cite.[5]

The Government's reading also is at odds with the ESA's definition of "critical habitat." The Government (at 40) agrees with petitioner that Congress intended that it "be easier to show" that a "feature" is "essential" to the conservation of a species than to show that an "area" is "essential" to the conservation of the species. See Pet. Br. 27. Yet the Government reads Section 3 to allow designation of unoccupied land that "currently lacks *all features* of the species' occupied critical habitat." U.S. Br. 37 (emphasis added). By allowing designation of areas that lack all habitat features, the Government's reading manifestly is *not* "consistent with th[e] understanding" that "the test for unoccupied critical habitat is '*more* stringent' than that for occupied critical habitat." *Id.* at 40.[6]

Section 3(5)(A) must be read reasonably. An "area" cannot be "essential for the conservation of the species"

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[5] CBD's suggestion (at 35, 47 n.19) that Section 3(5)(C) applies only to *occupied* critical habitat contradicts the language of Sections 3(5)(A) and (C) and CBD's own recognition (at 25) that the "term [critical habitat] extends fully to areas the species does not currently occupy."

[6] CBD drops the Government's pretense and argues (at 36) that the ESA makes it easier for FWS to designate unoccupied non-habitat than occupied habitat. That reading violates the ESA's language, structure, and legislative history and attributes an absurd intent to Congress.

if it lacks the "features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A). There is nothing "essential" about land on which a species cannot survive. There is especially nothing "essential" about unoccupied, uninhabitable, private land that does not and will not support the species, either now or in the foreseeable future. The Court should reject "the oxymoron of uninhabitable critical habitat." Pet. App. 138a (Jones, J.).[7]

The Government is wrong to claim (at 24) that our reading makes occupied "habitat" "automatically qualify" as occupied "critical habitat." The ESA defines occupied critical habitat to mean areas with essential features that "may require special management considerations or protection." 16 U.S.C. § 1532(5)-(A)(i)(II). If an area's features do not require protection—for example, they exist in abundance and the species is endangered for other reasons (such as disease or hunting)—that area should not be designated as critical habitat even if it is occupied. Our reading, unlike the Government's, thereby "give[s] effect" to "every clause and word of a statute." *Bennett*, 520 U.S. at 173.

The Government (at 28-29) relies on the word "any" in Section 4's term "any habitat." But the meaning of

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[7] FWS recently proposed new rules regarding critical habitat designation. 83 Fed. Reg. 35193 (July 25, 2018). Its proposal would codify the common-sense notion that an area is not "essential" unless "there is a reasonable likelihood that the area will contribute to the conservation of the species." *Id.* at 35201. And FWS could consider whether "extensive restoration would be needed" and whether "a non-federal landowner" is "unwilling to undertake or allow such restoration." *Id.* at 35198. This proposed rule operates prospectively only. *Id.* at 35194. And a rule giving the Service any discretion to designate non-habitat as critical habitat still violates the plain language of the ESA.

"any" "depends on the statutory context," and "'any' in this context does not bear the heavy weight the Government puts upon it." *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 629 (2018). "Any habitat" allows FWS to designate any land that contains habitat that is critical. It does not allow designations of non-habitat.

The ESA's definition of "conservation" also does not save the designation. U.S. Br. 30, 37-38. Using a designation to require habitat creation is neither "habitat acquisition and maintenance" nor "transplantation." 16 U.S.C. § 1532(3). Anyway, the ESA's definition of "conservation" cannot be read to repeal Section 4's operative language. Congress did not empower FWS to use designations to extort private landowners into transforming their land into habitat.[8]

C. The Government (at 30) points to the ESA's "purposes." But "no statute yet known 'pursues its [stated] purpose[ ] at all costs.'" *Henson*, 137 S. Ct. at 1725. And the ESA has several purposes. *Bennett*, 520 U.S. at 177. What is determinative is the "particular provision of law upon which the [agency] relies." *Id.* at 175-176. For the reasons explained above, Sections 3(5)(A), 3(5)(C), and 4(a)(3) reflect an unambiguous purpose to cabin FWS's designation authority.

Congress enacted those provisions to push back against this Court's decision in *Hill* and FWS's overbroad regulatory definition of critical habitat. Pet. Br. 7-10, 31-32. That purpose is served by reading "habitat" as written and commonly understood: to

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[8] Nothing in our argument prevents the Government from creating habitat on federal land or designating such habitat where it already exists. U.S. Br. 41 n.10. It is, after all, "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species" and "shall utilize their authorities" to do so. 16 U.S.C. § 1531(c)(1); see *id.* § 1536(a)(1).

exclude uninhabited areas that cannot support the species.

The Government (at 39) cites unenacted bills to imply that Congress intended a broader reading. That suggestion ignores House and Senate Report statements strongly criticizing aggressive designations of unoccupied areas, as well as the lead House conferee's explanation that Congress selected an "extremely narrow definition of critical habitat." See Pet. Br. 31-32. The 1978 amendments also tightened the definition of critical habitat from FWS's prior regulation. Congress rejected as insufficiently rigorous the regulation's language allowing designation of areas that "appreciably decrease the likelihood of the survival and recovery of a listed species." 43 Fed. Reg. 870, 875 (Jan. 4, 1978); see LEG. HIST. 880 (Rep. Duncan: there instead "ought to be a showing that [critical habitat] is essential to the conservation of the species"). And Congress added Section 3(5)(C) so that designations generally will be narrower than all land that can be occupied by the species. The Government would turn Congress's intent on its head by allowing designation of unoccupied, uninhabitable land that will have *no* appreciable effect on the species.

D. The Government cannot sidestep the canon of constitutional avoidance. It acknowledges (at 42) that the canon applies "when statutory language is susceptible of multiple interpretations." After arguing at length that the ESA's alleged ambiguities require *Chevron* deference, the Government abruptly reverses course and says (at 43) the canon does not apply because the Act is not "sufficiently ambiguous to warrant departure from its text." Of course, we are asking the Court to *apply* the plain text, not depart from it. Were there ambiguity, the canon would resolve it against FWS's broad reading; and the canon counsels

against finding ambiguity when statutory language is plain enough.[9]

The Government contends (at 42-43) that the "canon is inapplicable" because "the principal case petitioner relies on"—*SWANCC*—is factually dissimilar. But we cited *SWANCC* for its *legal* holding that the avoidance canon applies when agency interpretations test constitutional boundaries—a holding that applies far beyond *SWANCC*'s facts. *E.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 923 (1995); *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

SWANCC's federalism concerns apply forcefully. The Government needlessly reads the ESA to block development of non-habitat and force landowners to create habitat as the price of obtaining unrelated federal permits. That reading "raise[s] serious constitutional problems" by "permitting federal encroachment upon a traditional state power" over land use and "alter[ing] the federal-state framework." *SWANCC*, 531 U.S. at 173. As St. Tammany Parish's briefs attest, FWS's designation of Unit 1 threatens the Parish's goal to develop Unit 1 as a neighborhood and poses a fire hazard to its residents. Our reading ameliorates federal intrusion into core state and local land use authority by confining designations to actual habitat. See Alabama *et al.* Amicus Br. 1-2, 10

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[9] CBD's belief that we must challenge the ESA's constitutionality to invoke the canon "misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation." *Clark*, 543 U.S. at 381. "The canon is not a method of adjudicating constitutional questions," but "a tool for choosing between competing plausible interpretations." *Ibid.* "[O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions." *Ibid.*

(overbroad designations harm States by causing "loss of tax revenue," "reduced employment," "foreclosed industrial and recreational use," and "expenditure of taxpayer funds").

The Government's Commerce Clause argument (at 43-45) similarly fails. The Government does not deny that there is no interstate commerce in the frog. It invokes *Raich*'s aggregation principle, but nothing about the designation of non-habitat for a non-economic, intrastate species is "an essential part of a larger regulation of economic activity." *Gonzales* v. *Raich*, 545 U.S. 1, 36 (2005); see Pet. Br. 34. The Government's attempt to federalize zoning based on a species' absence from land that cannot sustain it strains the boundaries of the Commerce Clause. See Cato Amicus Br. 14-21. The Court can avoid that constitutionally suspect interpretation by reading the ESA to prohibit designation of non-habitat.

E. The Government goes further than the Fifth Circuit in bestowing limitless authority on FWS. It does not share the panel's view (Pet. App. 27a-28a) that an "inadequacy determination" cabins FWS's power to designate unoccupied areas. U.S. Br. 3 n.2 (amended regulation eliminated that requirement). And unlike the panel (Pet. App. 30a n.20), the Government (at 37) would allow FWS to designate areas that "currently lac[k] all features" necessary for species survival.

The Government assures the Court (at 39) that the word "essential" and its obligation to "us[e] the 'best scientific data available'" impose "meaningful limits." That is "a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action." Pet. App. 155a (Jones, J.). Indeed, the Government insists (at 37) that courts must be at their "'most deferential'" in reviewing FWS's designations. In this case, the mere

presence of ponds would allow FWS to designate uninhabitable private land, depriving its owners of $20 to $34 million in value, in the "hope" that the owners will "voluntar[ily]" transform the land into frog habitat "through prescribed burning" and "frog translocations." JA123. In the next case, the ponds are not needed at all because the land has "'forested areas' or 'a natural light regime.'" Pet. App. 156a (Jones, J.).

"The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Court should restore the ESA's limits on FWS's designation authority.

F. The clarity of statutory text, context, structure, history, and canons of construction overcome the Government's appeals to *Chevron* deference. "[D]eference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Sys.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018). Given "all the textual and structural clues" discussed above, "it's clear enough" that the ESA forbids designation of Unit 1 as critical habitat, "leaving no ambiguity for the agency to fill." *Wis. Cent.* v. *United States*, 138 S. Ct. 2067, 2074 (2018).

G. The Government does not dispute FWS's decades-long position that critical habitat designations do not benefit listed species, are forced by litigation and not biology, and divert agency resources from actual conservation. See Pet. Br. 42-45. Nor does the Government deny that the ESA provides tools that better protect species while treating landowners more equitably. In particular, it does not deny that FWS can purchase land or conservation easements, can fund similar state efforts, or can negotiate the release of an

experimental population (which prohibits critical habitat designation). *Id.* at 39-42.

The Government says (at 41-42) that these "conservation tools have no bearing" on critical habitat designations. But their existence shows that there is no need for this Court (or FWS) to stretch the plain meaning of "habitat" or "essential" in the name of species protection. This Court should reverse the Service's unlawful designation of Unit 1.

III. The Service's Decision Not To Exclude Unit 1 From Critical Habitat Designation Is Subject To Judicial Review.

Reversal is independently required because the Fifth Circuit erroneously refused to review FWS's decision not to exclude Unit 1 from designation under ESA Section 4(b)(2).

The Government defies this Court's unanimous decision in *Bennett* in arguing that courts may never review FWS's decisions not to exclude areas from critical habitat. *Bennett* explained that the Service's "ultimate decision" whether to exclude areas from designation "is reviewable" for "abuse of discretion." 520 U.S. at 172. The Government suggests (at 50-51) that its position "is not necessarily inconsistent" with *Bennett* by conceding that courts may review FWS's decisions "to exclude an area from critical habitat." But *Bennett* did not concern a decision *to exclude*. It ruled that an "implici[t]" designation of critical habitat—and thus a decision *not to exclude*—is reviewable for abuse of discretion. 520 U.S. at 172. *Bennett* confirms that the Fifth Circuit should have reviewed FWS's decision not to exclude Unit 1 from designation.[10]

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[10] CBD says (at 56) that a "decision to exclude is 'properly reviewable because it is equivalent to a decision not to designate

Bennett also was correct. The Government admits (at 48) there is a strong presumption in favor of judicial review of agency action. It attempts (at 46) to rebut that presumption by pointing to Section 4(b)(2)'s "two operative sentences." The first states that "[t]he Secretary shall designate critical habitat" after "taking into consideration the economic impact" and "any other relevant impact" of "specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The second sentence states that "[t]he Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless "extinction" "will result."

Those two sentences do not oust judicial review. The Government claims (at 47) that, because the second sentence provides that "the Service *may* exclude" an area without "identify[ing] any set of cases in which the Service *should* do so," decisions not to exclude are unreviewable. But this Court has never held that statutes phrased in the permissive are immune from judicial review. To the contrary, it has found law to apply even when statutes afford agencies wide latitude. *E.g.*, *Chappell*, 462 U.S. at 303 (agency "may correct any military record" when it "considers it necessary"); *Mulloy* v. *United States*, 398 U.S. 410, 414-416 (1970) ("may reopen" draft classifications); *Barlow* v. *Collins*, 397 U.S. 159, 165-167 (1970); see *Inova Alexandria Hosp.* v. *Shalala*, 244 F.3d 342, 348 (4th Cir. 2001) (citing decisions that "routinely conclude that judicial review is available notwithstanding

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critical habitat.'" But a decision *not* to exclude is by similar reasoning the equivalent of a decision to designate critical habitat, which CBD recognizes (at 54) "is fully reviewable."

statutory language that seemingly allows for unlimited discretion").

Section 4(b)(2) gives FWS discretion to determine whether to exclude an area. But review of those determinations for *abuse of discretion* honors that discretion. "[W]ide latitude" does not mean Congress has "left *everything*" to the agency. *Mach Mining*, 135 S. Ct. at 1652; see *Citizens of Overton Park* v. *Volpe*, 410 U.S. 402, 410 (1971).[11]

The Government reads Section 4(b)(2)'s sentences independently, but they must be "interpreted holistically." Pet. App. 160a n.21 (Jones, J.). The first sentence's demand to "tak[e] into consideration the economic impact" and "any other relevant impact" informs the Secretary's "determin[ation]" in the second sentence whether "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2). And vice versa. Rational weighing of costs and benefits during the exclusion decision is part of what it means to "tak[e] into consideration" all relevant impacts. If FWS calculates costs and benefits but then declines to exclude an area from designation because its owner's name starts with "W," the Service would not have "tak[en] into consideration" the relevant impacts and courts should set aside that exclusion decision as arbitrary and capricious.

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[11] *Webster* v. *Doe*, 486 U.S. 592, 600-601 (1988), concerned the National Security Act, which embodied "extraordinary deference" to the CIA Director. And courts "have long been hesitant to intrude" on national security determinations. *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993). Those considerations are absent here. See Wash. Legal Found. Amicus Br. 16-17; NFIB Amicus Br. 21-22 n.2.

For all the ink it spills insisting that "there exists 'no meaningful standard against which to judge the agency's exercise of discretion'" (U.S. Br. 48-49), the Government never once explains why the abuse-of-discretion standard under *State Farm* and its progeny fails to provide such a standard. Abuse of discretion is the "familiar default standard of the Administrative Procedure Act." *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 496 (2004). Our opening brief showed (at 52-56) that FWS's exclusion decision smacks of abuse of discretion. And the Government (at 53-54) contests our argument head-on.[12] That briefing confirms that courts can resolve disputes about exclusion determinations under APA standards.

The Government cannot find refuge in appeals to the ESA's "overriding purpose." U.S. Br. 51. This Court explained in *Bennett* that, while the ESA serves the "overall goal of species preservation," *another* objective —the "primary" one of the 1978 amendments—is to "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. Judicial review serves that statutory purpose.[13]

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[12] The Government's merits defense of FWS's exclusion decision is unpersuasive. The Government does not address FWS's failures to perform an area-specific analysis or explain *why* it decided that the high costs of designation are "not disproportionate." See Pet. Br. 53. Nor does it defend FWS's decision to discount stigma and oil and gas costs as too uncertain while refusing to discount "biological" benefits that are more speculative. See *id.* at 54-55.

[13] As we explained (Pet. Br. 47 n.13), the 1978 House Report shows an intent to give the Secretary broad discretion, but not to make exclusion decisions immune from judicial oversight. See AFBF Amicus Br. 29-33; NFIB Amicus Br. 23-27. A complete lack of standards to guide agency action also would raise constitutional concerns. See NAHB Amicus Br. 9-12.

The Court should reaffirm *Bennett*'s conclusion that decisions not to exclude areas from critical habitat designation are reviewable for abuse of discretion. And for the largely uncontested reasons we identified (Pet. Br. 52-56), the Court should reverse the judgment below or remand for further proceedings.

IV. This Court Has Article III Jurisdiction.

Both courts below held that petitioner has standing. Pet. App. 13a-14a, 95a-99a. The Government does not contest that ruling. Only CBD—raising an argument it did not assert in the Fifth Circuit or its brief in opposition—contends that the unlawful designation of Unit 1 does not inflict an "injury in fact" on petitioner. To quote the district court, that contention is "utterly frivolous." Pet. App. 98a.

The Fifth Circuit correctly held that the designation injured petitioner by "'immediately'" reducing the value of its land. Pet. App. 13a; see JA83. "Certainly he who is 'likely to be financially injured'" has standing. *Ass'n of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 154 (1970). "[L]oss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). Even unrealized losses confer standing. *Ibid.* (lost chance to obtain settlement); *Clinton* v. *City of New York*, 524 U.S. 417, 430 (1998) ("contingent liability"); *Bryant* v. *Yellen*, 447 U.S. 352, 367 (1980) (reduced ability to purchase land). An *actual* loss of Unit 1's value plainly is an injury.

That petitioner is an aggrieved landowner and lessee "reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete." *Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007). This Court long ago held that landowners may challenge government actions that "reduce the value of [their] lands and destroy their marketability." *Vill. of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386 (1926).

Although standing is shown without it, the Fifth Circuit erred in dismissing the landowners' development plans as too speculative. Pet. App. 11a-13a. The landowners "spent several hundred thousand dollars on a massive comprehensive planning and zoning effort to accommodate th[e] future development" of Unit 1. JA33. As a result, St. Tammany Parish rezoned the land "for future development." JA29; see JA80-83. Those are not the sort of "'some day' intentions"—like the "profession of an 'intent'" to view wildlife in Sri Lanka without "concrete plans" to do so—that this Court addressed in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992). See *Clinton*, 524 U.S. at 432-433.

In fact, *Lujan* shows Weyerhaeuser has standing. It held that when "the plaintiff" is "an object of the [challenged] action," there is "little question" that the plaintiff has standing. 504 U.S. at 561. As CBD admits (at 22), petitioner falls into that camp.

CBD cites (at 22) to *Spokeo* v. *Robins*, 136 S. Ct. 1540 (2016). There, plaintiff challenged a credit report that overstated his wealth, which the Ninth Circuit held on remand was a concrete injury. 867 F.3d 1108 (9th Cir. 2017). The designation of Unit 1, which saps the land of value and imposes a regulatory regime that impedes development, is orders of magnitude worse. The designation imposes a "'real,' and not 'abstract'" injury that "cause[s] harm or present[s] any material risk of harm." *Spokeo*, 136 S. Ct. at 1548, 1550; see *id.* at 1551 (Thomas, J., concurring) (plaintiffs have standing to protect "property rights"); Energy and Wildlife Action Coalition Amicus Br. 20-27.

CBD also invokes *National Park Hospitality Association* v. *Department of Interior*, 538 U.S. 803 (2003), which concerned ripeness, not standing. There, the Court refused to adjudicate a "facial challenge" to a regulation that was "nothing more than a 'general

statemen[t] of policy'" because it caused "no practical harm" and "further factual development would significantly advance [the Court's] ability to deal with the legal issues presented." *Id.* at 807, 809, 810, 812.

Those concerns do not apply here. Petitioner challenges the final designation of *its owned and leased land*, not some abstract policy. The designation immediately reduced the land's value and precludes petitioner from obtaining federal "licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid" (50 C.F.R. § 402.02) without a costly and time-consuming Section 7 consultation process. See *Otay Mesa Prop., L.P.* v. *U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) ("Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to result in the destruction or adverse modification of critical habitat") (quotation marks omitted); EWAC Amicus Br. 26-27 (even if federal action is not triggered, designation adversely affects project financing); cf. *U.S. Army Corps of Engineers* v. *Hawkes Co.*, 136 S. Ct. 1807, 1814-1815 (2016) (CWA jurisdictional determinations, which trigger an "arduous, expensive, and long" process, have "'direct and appreciable'" consequences). Finally, unlike in *National Park Hospitality*, further factual development —on top of a long administrative record compiled over a decade—will shed no further light on whether the designation violated the ESA.[14]

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[14] CBD's ripeness argument is thus meritless. It also is waived because it was not raised in CBD's brief in opposition. See *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 & n.10 (2010).

There is no Article III barrier preventing this Court from overturning FWS's unlawful designation of Unit 1 as critical habitat of the dusky gopher frog.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 17-71

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WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF ALABAMA AND 19 ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.

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INTEREST OF *AMICI CURIAE*[1]

The *amici* States are deeply concerned that the federal government's expansive reading of the Endangered Species Act strips the statute of the express limitations that Congress imposed on the United States Fish and Wildlife Service with regard to the designation of "critical habitat."

Two years ago, twenty States, including these *amici*, challenged two formal rules that expressly authorized the unlawful method of critical-habitat designation the Service followed in this case. *See Alabama ex rel. Strange v. Nat'l Marine Fisheries Serv.*, No. 16-cv-593 (S.D. Ala.). The States settled that lawsuit with the Service, which agreed to "reconsider" the challenged rules by this summer. Despite the Service's agreement with the States to reconsider the challenged rules, it continues in this case to defend the expansive and erroneous theory of habitat designation that motivated their adoption in the first place. Accordingly, the real-world impact of the States' settlement may depend on the outcome of this case.

The Service's expansive reading of the existing rules and statute imposes significant costs on the States. Critical habitat determinations have serious consequences for the economic and ecological interests of the States. Designations of critical habitat that go beyond what the statute allows cost jobs and tax revenue, while the States' efforts to comply with these designations often require the expenditure of taxpayer funds.

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[1] Although the States have the right to file this brief under this Court's Rules, the parties have also consented.

The States have a profound interest in maintaining the delicate balance Congress struck in the ESA between ensuring the recovery of listed species and protecting the private property rights of citizens and the sovereign interests of the States. The Service's defense of the court of appeals upsets that balance, and this Court should reverse.

SUMMARY OF ARGUMENT

The Court should reverse the court of appeals.

On the first question presented, the plain text of the Endangered Species Act requires that unoccupied critical habitat have the physical and biological features necessary for the endangered species to survive. Critical habitat is defined as an area with the essential features necessary for the endangered species. Unoccupied critical habitat is but a sub-type of critical habitat; to designate unoccupied critical habitat the Service must make an additional finding that occupied areas are not sufficient for the species to survive. As numerous courts have recognized, the Act thus makes it harder for the Service to designate unoccupied habitat than for it to designate occupied habitat. But the court of appeals' anomalous decision here makes it easier for the Service to designate land as critical habitat if the endangered species does not, and cannot, live there.

On the second question presented, the court of appeals' decision is inconsistent with this Court's precedent. Although the Service has discretion in concluding not to exclude an area from a critical-habitat designation, that discretion does not mean that the Service's decision is unreviewable. The Service has the mandatory obligation to consider the

economic impact of its decisions. The designation at issue here imposes millions of dollars in cost with no biological benefit to the endangered species, such that any meaningful consideration of economic impact would require the Service to exclude the area.

Reaching the right answer in this case is no mere academic exercise. The Endangered Species Act is an important law that provides real and meaningful environmental benefits. But critical habitat designations also constrict human activity and impose significant economic costs on States, local governments, and private landowners. The designation at issue here goes too far, and the court of appeals should be reversed.

ARGUMENT

I. The court of appeals' expansive definition of the word "essential" ignores the plain text of the Endangered Species Act.

The Fifth Circuit's decision gives the United States Fish and Wildlife Service unfettered reign to declare areas that are unsuitable for endangered species nevertheless "essential" to their conservation.

The plain text of the Endangered Species Act imposes more stringent requirements on the designation of unoccupied land as critical habitat than on the designation of occupied land. That act defines critical habitat as areas occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532 (5)(A)(i). Unoccupied areas trigger an

additional requirement—the Secretary must determine that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). As other courts have noted, the statute imposes "a more onerous procedure on the designation of unoccupied areas." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

The Fifth Circuit's decision flips this reasoning on its head. Rather than reading "essential for the conservation of the species" as an additional requirement, the Fifth Circuit lowered the bar for designating unoccupied habitat. If the Secretary finds occupied areas are insufficient for conservation, he may designate any unoccupied area as critical habitat, regardless of whether the area is or ever will be habitable by the species. Under the Fifth Circuit's reasoning, although the Secretary must show that areas *where the species is present* have all physical and biological features essential to conservation, no such showing is required for unoccupied lands. *See* Weyerhaeuser Pet. App. 23a.

Thus, the panel's decision strips the word "essential" of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator. As Judge Owen noted in her dissent from the panel's decision, this "interpretation of 'essential'

means that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Weyerhaeuser Pet. App. 54a.

II. The Fifth Circuit's holding that habitat exclusion decisions are nonreviewable contradicts *Bennett v. Spear*.

The Fifth Circuit also erred in declaring certain critical habitat decisions immune from judicial challenge. Congress, recognizing the significant economic and environmental impacts critical habitat designations entail, amended the Endangered Species Act to include a mandatory cost-benefit analysis of critical habitat decisions:

> The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as

> critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

The panel found these decisions nonreviewable because the Administrative Procedure Act forbids judicial review of choices "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The panel explained, "[Section 1533(b)(2)] establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation." Weyerhaeuser Pet. App. 35a (citing *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015).

But the Court has rejected that argument. In *Bennett v. Spear*, 520 U.S. 154 (1997), the Court held that § 1533(b)(2) decisions are not immune from judicial review. *Bennett* involved the Endangered Species Act's citizen-suit provision. Like the Administrative Procedure Act, it precludes challenges to decisions that are "discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C). In *Bennett*, the Government sought to dismiss the underlying action on the basis that the duties of § 1533(b)(2) are discretionary and thus nonreviewable. 520 U.S. at 172. The Court rejected that argument: "[T]he terms of § 1533(b)(2) are plainly those of obligation rather than discretion . . . ." *Id.*

The Court found Section 1533(b)(2) decisions reviewable, notwithstanding the discretion granted by the "may" clause. The Court explained, "[T]he fact that the Secretary's ultimate decision is

reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533 (b)(2)). On this point the Court was emphatic: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Id.* (citing *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943)); *see also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (explaining that the use of "a permissive term such as 'may' rather than a mandatory term such as 'shall,' . . . suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show *deference* to the agency's determination" but that "such language does not mean the matter is *committed* exclusively to agency discretion."). Thus, the Court concluded that a "§ 1533 claim is reviewable." *Bennett*, 520 U.S. at 172.

The lower court did not examine the reviewability question in light of *Bennett*, mentioning the case only once in passing. The decision to designate critical habitat and the decision to exclude certain areas from that designation have far-reaching implications. In both instances, the Secretary is exercising the coercive power of the government over private property. When the Secretary abuses her discretion, the courts must have the power to correct that overreach.

In refusing even to consider whether the Secretary overreached, the panel relied on the Court's decision in *Heckler v. Chaney*, the leading

case on nonreviewability. 470 U.S. 821 (1985). In finding nonreviewable an agency's decision not to employ its prosecutorial powers, the *Heckler* Court noted that an agency "generally does not exercise its coercive power . . . and thus does not infringe upon areas that courts often are called upon to protect" when it refuses to act. *Id.* at 832. But when the Secretary refuses to exclude areas from a critical habitat designation, she is not refusing to act in the sense used by the *Heckler* Court. Rather, she is exercising her coercive power to the fullest. When she does so, her action touches upon the most basic property rights of those within the critical habitat designation. Although the Endangered Species Act is "a noble effort," it is one that has "the ability to ruin individuals' lives . . . [M]ost Americans do not realize that hundreds of thousands of rural citizens face the potential loss of their livelihoods stemming from FWS designations of [critical habitat] under the ESA." Matthew Groban, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give A Hoot About the Public Interest It "Claims" to Protect?*, 22 VILL. ENVTL. L.J. 259, 279 (2011). It also has costs for the States, both in reduced tax revenue and jobs lost. *See* Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST (May 11, 2014).[2]

The Secretary cannot ignore these costs or impose them without a commensurate benefit. As the Court has found, it is inherently irrational "to impose

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[2] https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/.

billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2701 (2015). The decision of the Fifth Circuit allows the Secretary to do just that, with no recourse to the courts.

III. Critical-habitat designations have significant financial effects on States and private parties.

Even when critical-habitat designations benefit a species, they also come with a cost. "Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan*, 135 S. Ct. at 2707. In the context of the Endangered Species Act, it is beyond dispute that "[c]onsiderable regulatory burdens and corresponding economic costs are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation." Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation A Comment on Critical Habitat and the Challenge of Regulating Small Harms*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10678, 10680 (2013). For example, the Court's first major decision examining that act, *Tennessee Valley Authority v. Hill*, resulted in the suspension of a dam-building project that was 80 percent complete and for which Congress had spent more than $100 million of taxpayer money. 437 U.S. 153, 172 (1978).

It was a harbinger of things to come. Critical habitat designations, by their very nature, limit

human activity. That limitation almost always results in a lost economic opportunity. The impact ripples through the economy; in an average industry, every billion dollars in regulatory costs results in a loss of over 8,000 jobs. Sam Batkins & Ben Gitis, *The Cumulative Impact of Regulatory Cost Burdens on Employment*, AM. ACTION FORUM (May 8, 2014).[3] As a consequence, States also suffer a subsequent loss of tax revenue, both as a result of reduced employment as well as foreclosed industrial and recreational use of areas designated critical habitat. For instance, proposals to conserve the sage grouse "could cost up to 31,000 jobs, up to $5.6 billion in annual economic activity and more than $262 million in lost state and local revenue every year . . . ." Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST (May 11, 2014).[4] And, in the case below, as Judge Jones observed in her dissent from denial of rehearing en banc, "One shocking fact is that the landowners could suffer up to $34 million in economic impact. Another shocking fact is that there is virtually nothing on the other side of the economic ledger." Weyerhaeuser Pet. App. 158a (citation omitted). Not to mention, it is uncontested that the dusky gopher frog could not survive in Unit 1—its "critical habitat." *See* Weyerhaeuser Pet. App. 23a. Thus, there are only—at most—speculative conservation benefits to this designation.

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[3] http://www.americanactionforum.org/research/the-cumulative-impact-of-regulatory-cost-burdens-on-employment/.

[4] https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/.

While the ESA may certainly require sacrifices in order to preserve endangered species, the decision to impose those costs on States and the public must conform with the requirements of the statute. That did not happen here.

CONCLUSION

The Court should reverse the court of appeals.

Respectfully submitted,

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No. 17-71

IN THE

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BRIEF OF *AMICI CURIAE* AMERICAN EXPLORATION & PRODUCTION COUNCIL, AMERICAN PETROLEUM INSTITUTE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

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INTERESTS OF *AMICI CURIAE*

Amici represent a broad cross-section of U.S. industry, including public and private entities engaged in the manufacturing, petroleum, natural gas and electric energy sectors.[1] *Amici's* members undertake a wide range of activities across the nation that are vital to a thriving U.S. economy and provide much needed products, services and jobs across the country. *Amici's* members have extensive experience with regulation under the Endangered Species Act ("ESA" or the "Act"), including with the designation of areas owned or used by their members as "critical habitat" by the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, the "Services"), and with determinations by the Services whether uses or effects to such areas constitute a prohibited "adverse modification." As such, *amici* and their members have compelling interests at stake in this Court's consideration of the designation of unoccupied areas as critical habitat for the dusky gopher frog.

Designations of land and water as critical habitat can impede critical economic growth, including activities by *amici's* members necessary to sustain the U.S. economy. These burdens often occur without

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

commensurate benefits to species – including where a designation covers areas not actually occupied by, or that does not constitute habitat for, the species (or both, as in this case).

Amici's activities are essential to the reliable, safe and affordable supply of energy and other products and services to U.S. consumers. As such, administration of the ESA regulatory program is important not only to *amici*, but also to the public at large, whose health, safety and general welfare depend on the affordable and reliable delivery of the products and services provided by *amici's* members.

The American Exploration and Production Council ("AXPC") is a national trade association representing 31 of America's premier independent natural gas and oil exploration and production companies. AXPC's mission is to constructively and thoughtfully work for sound energy, environmental, and related domestic public policies that encourage the responsible exploration, development and production of natural gas and oil to meet the needs of consumers and fuel the nation's economy.

The American Petroleum Institute ("API") is a nationwide, non-profit trade association that represents over 600 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

The Independent Petroleum Association of America ("IPAA") represents thousands of independent oil and natural gas producers and service companies across the United States. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the U.S., representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community, and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the U.S.

The National Rural Electric Cooperative Association ("NRECA") is the national service organization for America's Electric Cooperatives, the nation's member-owned, not-for-profit electric cooperatives that constitute a unique sector of the electric utility industry. Collectively NRECA's 897 cooperative members provide electric service over 56 percent of the nation's land area with electric distribution lines totaling 2.6 million miles. All or portions of 2,500 of the nation's 3,141 counties (approximately 80 percent) are served by electric cooperatives.

The Utility Water Act Group ("UWAG") is a voluntary, unincorporated group of 153 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the NRECA, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Fifth Circuit converted the Services' limited authority to designate critical habitat into an expansive power that would be unrecognizable to the Congress that enacted it. When Congress amended the ESA in 1978 to authorize the designation of critical habitat, it sought to provide additional habitat protections for listed species in specific circumstances, while ensuring that those protections balanced "other legitimate national goals and priorities such as providing energy, economic development and other benefits to the American people." S. Rep. No. 95-874, at 2 (1978), *reprinted in* S. Comm. on Env't & Pub. Works, 97th Cong., 2d Sess., A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980, at 940 (Feb. 1982) ("Legislative History").

The Fifth Circuit's decision undermines the structure and intent of the Act in two ways. First, the decision vests the Services with broad authority to designate land or water as critical habitat even if those areas are not occupied by the species and lack the "physical or biological features" required for those areas to serve as habitat for the species. Second, the decision renders unreviewable the Services' statutorily mandated consideration of economic impacts in connection with a determination whether to exclude an area from designation. Both holdings were wrong and should be reversed.

I. The Fifth Circuit failed to adhere to the plain text of the Act, including provisions that limit designation of critical habitat to areas that actually constitute "habitat" for the species, and provisions that require designated critical habitat to meet all of the statutory elements for critical habitat *at the time of designation*. The Fifth Circuit also ignored the structure of the Act which, against the backdrop of numerous other statutory mechanisms governing listed species and their habitat, demonstrates that the designation of unoccupied areas is such an extraordinary action that it requires a separate determination by the Secretary that the designation is "essential" to taking one or more "conservation" actions specified in the Act (a requirement the Secretary did not satisfy in this case).

II. Congress did not render unreviewable the Services' decision whether to exclude lands or waters from critical habitat. These decisions are governed by meaningful standards specified in the Act and are

not exempt from review. This Court's reasoning in prior cases, such as *Bennett* v. *Spear*, 520 U.S. 154 (1997), demonstrates that exclusion decisions are subject to judicial review for abuse of discretion.

III. Reversing the Fifth Circuit and enforcing the ESA's habitat provisions as written would effectuate Congress's intent, while leaving the statute's multitude of other protection mechanisms for species and their habitat undiminished, as explained by the six judges dissenting from the Fifth Circuit's denial of rehearing *en banc*. Those other protection mechanisms span a wide range of protections and programs established by the Act, and are reflected by the many examples of habitat conservation measures that *amici* and their members undertake pursuant to the Act to protect and benefit species and their habitat. The broad suite of conservation initiatives and other tools Congress provided in the Act to conserve species and their habitat confirms the ESA functions well to protect species, without any need to broadly designate unoccupied areas of land or water as critical habitat, and reinforces the extraordinary nature of a determination by the Secretary that designation of unoccupied land as critical habitat is "essential" to the ability to take "conservation" actions for a species.

ARGUMENT

I. The Fifth Circuit Ignored Not Only the Plain Statutory Text, But Also Key Indications That Congress Specifically and Intentionally Limited the Services' Authority to Designate Unoccupied Critical Habitat.

The Fifth Circuit failed to follow important textual limits on the Services' authority to designate unoccupied critical habitat. Pet. Br. 35. The Act's use of the plain term "critical habitat" dictates that both occupied and unoccupied areas must actually be "habitat" to be designated "critical habitat." 16 U.S.C. §§ 1532(5); 1533(a)(3)(A); 1536(a)(2). Indeed, the Act emphasizes that a designated area must be "habitat" by the placement of the word "habitat" first in the specific provision that authorizes such designations. *Id.* § 1533(a)(3)(A)(i) (Services are authorized to "designate any *habitat* of such species which is then considered to be critical habitat") (emphasis added). Equally plain, the ESA section 7(a)(2) consultation provisions – the provisions that give regulatory force to critical habitat designations – likewise focus on "habitat," specifying that consultation must insure that federal agency actions are not likely to destroy or adversely modify the "habitat of such species which is determined by the Secretary ... to be critical." *Id.* § 1536(a)(2).

The Fifth Circuit also neglected the textual requirement that designated critical habitat meet all of the statutory elements for designation – such as be-

ing actual habitat for the species – *at the time of the designation*. The Act authorizes the Services, "*concurrently*" with listing a species, to designate habitat "*then* considered to be critical habitat." *Id.* § 1533(a)(3)(A)(i) (emphases added). Indeed, the Act defines critical habitat as those areas on which essential physical or biological features "are found" and areas which "are essential" for conservation of the species. *Id.* § 1532(5)(A). The Act does not authorize the Services to designate areas that may someday be habitat or someday meet the other critical habitat requirements. Instead, for areas that do not meet those requirements at the time of listing (but may meet those requirements in the future), the Act specifies that the Services may revise critical habitat designations "from time-to-time thereafter as appropriate." *Id.* § 1533(a)(3)(A)(ii).

Beyond the text of the critical habitat provisions, the Fifth Circuit ignored other strong indicators of Congress's intent to limit the Services' authority to designate unoccupied areas as critical habitat, including the extraordinary nature of such a decision. Specifically, Congress structured the ESA to focus on the listing of species as threatened or endangered, and for such listings to trigger a wide range of protections and programs for listed species and their habitat. By contrast, Congress specified separate processes and considerations for the designation of critical habitat and created a more limited role in the Act for such areas. Critically, Congress made the designation of *unoccupied* areas an action that requires a wholly separate determination by the Secre-

tary that such a designation is "essential" to undertaking the types of specific and targeted "conservation" actions that are detailed in the Act. *Id.* § 1532(3), (5)(A)(ii). The Secretary made no such determination here.

A. Congress Created a Unique Process and Limited Role for the Designation of Critical Habitat.

The ESA principally focuses on *species*. The listing of a species triggers a wide range of statutory actions and protections for that species including, for example: the development and implementation of a recovery plan, *id.* § 1533(f); consultation on federal agency actions to ensure against jeopardy to the species, *id.* § 1536(a)(2); and the prohibition of take, import, export, possession, sale and transport of the species, *id.* §§ 1538(a), 1533(d). Designation of critical habitat, by contrast and design, plays a more limited (albeit powerful) role under the Act.

When enacted in 1973, the ESA provided for the listing and protection of threatened and endangered species, but included no requirement or process to designate critical habitat. Pub. L. No. 93-205, 87 Stat. 884 (1973). Congress amended the ESA in 1978, adding a new requirement that, "to the maximum extent prudent," the Services "specify any habitat ... considered to be critical" at the time they propose to list a species. Pub. L. No. 95-632, 92 Stat. 3751, 3764 (1978) (codified at 16 U.S.C. § 1533(a)(3)(A)).

Congress recognized that designating entire areas of land or water as "critical habitat" is far different, and potentially far more costly and disproportionately burdensome, than listing particular species for protection. Designation of an area as critical habitat results in restrictions on uses that can be made of that area, and often leads to a substantial reduction in the economic value of that area. Accordingly, Congress required the Services to consider non-biological factors, including economic, national security, and other effects of designation, before "specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2); *see* H.R. Rep. No. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467.

The legislative history illustrates Congress's concern that, under the Services' regulations at that time (when far fewer species were listed as threatened or endangered), the Services were treating areas covering a species' entire range as "critical to the continued existence of a species." Legislative History at 948. Congress expressed concern about "the implications of this policy when extremely large land areas are involved in a critical habitat designation," and sought to balance "the [ESA's] mandate to protect and manage endangered and threatened species [with] other legitimate national goals and priorities. such as providing energy, economic development and other benefits to the American people." *Id.* at 940.

Thus, although procedurally and temporally tied to the decision to list a species, Congress specified additional considerations and requirements for designating land as critical habitat beyond those re-

quired for listing decisions. For example, unlike listing decisions, designations must be "prudent and determinable," 16 U.S.C. § 1533(a)(3)(A); "tak[e] into consideration the economic impact" of the designation, *id.* § 1533(b)(2); and consider impacts on national security and any other relevant impacts, *id.*

B. Designation of Unoccupied Critical Habitat Requires a Specific Determination by the Secretary that the Area is "Essential" to Executing Conservation Actions.

Designation of critical habitat imposes additional restrictions on a full range of activities across the landscape. It does so through ESA section 7(a)(2), which requires federal agencies to insure, through consultation with the Services, that their actions (including issuance of federal permits) are not likely to destroy or adversely modify designated critical habitat. *Id.* § 1536(a)(2).

The term "critical habitat" is defined in ESA section 3. *Id.* § 1532(5)(A). The definition specifically identifies those habitat features and elements that must be present for designation of *occupied* critical habitat. The areas designated must be: (1) specific areas; (2) within the area occupied by the species; (3) at the time the species is listed; (4) on which are found physical or biological features; (5) essential to conservation of the species; and which (6) may require special management considerations or protection. *Id.* § 1532(5)(A). Congress thus defined "occupied" critical habitat by carefully circumscribing

those features that must be found on the area so designated, but left the procedure for such designations to ESA section 4.

By sharp contrast, the ESA section 3 definition of "critical habitat" specifies a crucial additional procedural step that the Secretary must take before designating *unoccupied* areas as critical habitat. Unoccupied areas may be designated only "upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). The structure of the Act thus demonstrates that designation of unoccupied areas is an extraordinary action requiring a separate determination by the Secretary that the area is "essential" to taking the types of "conservation" actions that Congress defined in section 3.

The definition of "conservation" reveals the precise nature of a determination by the Secretary that designation of an area is "essential for the conservation of the species." Congress defined "conservation" in ESA section 3 to convey targeted, beneficial actions for the species. Specifically, "conservation" is defined by the Act as the "use of all methods and procedures which are necessary to bring any [listed] species to the point at which the measures provided pursuant to this chapter are no longer necessary," including "activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and in ... extraordinary case[s] ... regulated taking." 16 U.S.C. § 1532(3). Plainly "conservation" means ac-

tion, not inaction. Thus, to determine that an unoccupied area is "essential for the conservation of the species," the Secretary must find that designation of the area is essential to carrying out the types of targeted actions specified in the definition of "conservation," such as habitat acquisition, law enforcement, research or transplantation. The Secretary failed to make such a finding here.[2]

The courts have recognized the higher standard Congress set for designating unoccupied areas as critical habitat. As the Ninth Circuit has noted, the ESA "differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Ariz. Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). Thus, the "[d]esignation of unoccupied land is a more extraordinary event tha[n] designation of occupied lands." *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 125 (D.D.C. 2004). "[W]ith unoccupied areas, it

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[2] FWS made, and the Fifth Circuit required, no such determination with respect to specific "conservation" actions that FWS intends to take within the unoccupied areas designated as critical habitat for the gopher frog. Indeed, FWS acknowledged that it has "no existing agreements with the private landowners" to create habitat conditions on the site or to move the frog to the site, and that the timber lease on the site does not expire until 2043. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), Final Rule, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

is not enough that the area's *features* be essential to conservation, *the area itself* must be essential." *Id.* at 119 (emphases added). Demonstrating that an area is "essential" to the types of "conservation" actions specified by Congress is no small undertaking.

When viewed within the larger statutory framework of protective measures and programs for listed species, the Services' power to designate unoccupied areas as critical habitat is designed to be limited and exercised with caution. But the Fifth Circuit's decision upends this statutory framework by affirming the Services' loose approach to designation of unoccupied areas, including where evidence demonstrates that the area is not even habitat, plays no present role in the conservation of the species, and could not play such a role now or in the future absent significant physical alternations that FWS lacks authority (and has no plans) to impose.

C. Designations of Critical Habitat Must Be Based on Conditions at the Time the Species Is Listed, Not on Speculation About Future Conditions.

Congress plainly specified that designations of areas as critical habitat – whether occupied or unoccupied – must be based on conditions at the time the area is designated, not on speculation about future conditions. For an area that does not meet critical habitat prerequisites today, but may someday meet the criteria set forth in the Act, Congress provided a straightforward option in ESA section 4: the Service may propose to designate that area as critical habitat

at a later time when it meets these criteria. 16 U.S.C. § 1533(a)(3)(A)(ii).

Congress repeatedly used present tense terms to underscore the requirement that designated critical habitat must meet all of the statutory elements for designation – including that the area is *actually* habitat for the species – at the time of designation. The definition of critical habitat in ESA section 3 specifies that an area designated as occupied critical habitat must be an area on which physical or biological features essential to the species "*are* found." *Id.* § 1532(5)(A)(i) (emphasis added). Unoccupied lands may be designated as critical only if the Secretary finds that such areas "*are* essential" for the conservation of the species. *Id.* § 1532(5)(A)(ii) (emphasis added).

The critical habitat designation procedures specified in ESA section 4 likewise require that designations be based on present conditions. Section 4 directs the Secretary, concurrent with the listing of a species, to designate habitat "*then* considered to be critical." *Id.* § 1533(a)(3)(A)(i) (emphasis added). Recognizing that current conditions may change, the Services "may, from time-to-time thereafter as appropriate, revise such designation." *Id.* § 1533(a)(3)(A)(ii). In other words, an area may be designated if it is truly "habitat" that is "critical" today, not because it might become habitat or critical at some point in the future.

The courts have consistently observed the statutory emphasis on present-day circumstances, reject-

ing efforts by the Services to designate critical habitat based on conditions not actually in existence at the time of designation. *See Home Builders Ass'n of N. Cal.* v. *U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1215, 1216-17 (E.D. Cal. 2003) (invalidating designation of areas that are "'likely to develop' essential habitat components, but do not contain them now," as occupied critical habitat); *Cape Hatteras Access Pres. All.*, 344 F. Supp. 2d at 122–23 (vacating critical habitat designation that included areas FWS determined to be "occupied" by the species, but on which primary constituent elements were not found); *Otay Mesa Prop., L.P.* v. *U.S. Dep't of the Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011) (vacating designation of critical habitat where record did not support determination that area was "occupied" at the time of listing).

Congress further demonstrated that designation must be based on present-day conditions by requiring critical habitat designations be based on the "best scientific data available." 16 U.S.C. § 1533(b)(2). As this Court has noted, the purpose of that requirement "is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett*, 520 U.S. at 176. Unfounded speculation about future conditions is not science, much less "best science." Critical habitat designations must be based on the best evidence available at the time of designation, not open-ended and speculative projections as to future possible conditions.

The Fifth Circuit's decision, however, upholds a designation of unoccupied areas as critical habitat

based merely on the *potential* to support the species in the future *if* certain future activities occur. That approach cannot be squared with the statute's use of the present tense, or its requirement that the Services apply the "best scientific data available." Instead, it opens the door to broad designations based on projected and theorized future conditions, including, for example, localized climate change, even though current climate change models do not provide reliable predictions of future conditions at narrow geographical scales or on short time horizons that would be sufficient to support designation of critical habitat pursuant to the ESA.[3] Indeed, FWS has pro-

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[3] FWS relied, in part, on the potential for future climate change impacts to justify the designation, explaining that:

> Unit 1 provides a refuge for the frog should the other sites be negatively affected by environmental threats or catastrophic events. An example of one of these threats is climate change. ... For species such as the dusky gopher frog, one of the greatest threats posed by climate change is water availability. ... The designation of critical habitat, and the creation of new populations of dusky gopher frogs through reintroductions, should give the species better odds of survival and recovery given the threats posed by climate change.

77 Fed. Reg. at 35,124. Correspondingly, the Services promulgated new critical habitat regulations in 2016 that generally follow the designation criteria FWS applied here. Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, Final Rule, 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). Under the 2016 regulations, areas could be designated as critical habitat even if such areas are "unoccupied"

vided no record evidence that current climate change models can do so.[4] These significant limitations on the use of climate science to project localized or near-term effects have been recognized by the Intergovernmental Panel on Climate Change ("IPCC").[5] The IPCC describes in detail the many limitations and uncertainties that characterize current climate models.[6] IPCC AR5 at 751-55.

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by the species and contain none of the "physical or biological features" required by the species. The 2016 regulations also allow designations based on speculation about future conditions, such as estimates of future species needs and projections of localized climate change impacts. After litigation brought by several of the *amici* and others, the Services are now reconsidering the 2016 critical habitat rules. *See Util. Water Act Grp., et al.* v. *Nat'l Marine Fisheries Servs., et al.*, No. 1:17-cv-00206-CG-N (S.D. Ala. voluntarily dismissed Mar. 20, 2018).

[4] In fact, in an earlier proposal to designate critical habitat for the gopher frog, FWS acknowledged that "[t]he information currently available on the effects of global climate change and increasing temperatures does not make sufficiently precise estimates of the location and magnitude of the effects." Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Mississippi Gopher Frog, Proposed Rule, 75 Fed. Reg. 31,387, 31,390 (June 3, 2010).

[5] The IPCC is considered the leading international body assessing climate change and was established in 1988 by the United Nations and the World Meteorological Organization.

[6] IPCC, Climate Change 2013: The Physical Science Basis, Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013) ("IPCC AR5"), http://www.ipcc.ch/report/ar5/wg1. *See also* K.J. Hayhoe et al., Climate Models, Scenarios, and Projections, *in Climate Science Special Report: Fourth National Climate Assessment, Volume I*, Ch. 4, pp. 133-60 (D.J. Wuebbles et al. eds.,

The current state of climate science does not support impact projections below a continental or regional scale, and particularly not to the localized and highly complex habitat of a particular species such as the dusky gopher frog. A designation based on potential future conditions, including, *e.g.*, climate change effects, is contrary to the terms and structure of the ESA, which guard against speculation and allow review and potential revision of critical habitat designations based on actual evidence of emergence of features essential to the species.

II. Congress Did Not Vest the Services with Unreviewable Discretion Whether to Exclude an Area from Critical Habitat.

The Fifth Circuit also erred in finding unreviewable FWS's decision not to exclude Unit 1 from the critical habitat designation. The Fifth Circuit blurred the fundamental distinction between: (1) matters that Congress has delegated to an agency for which the agency has discretion, albeit constrained by statutory requirements or standards; and (2) matters that Congress has entirely committed to agency discretion.

The Secretary's determination whether to exclude areas from designation is not wholly committed to agency discretion, and thus does not fall within the Administrative Procedure Act's ("APA") narrow ex-

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2017), U.S. Global Change Research Program, Washington, DC, USA, doi: 10.7930/J0WH2N54; https://science2017.globalchange.gov/downloads/CSSR_Ch4_Climate_Models_Scenarios_Projections.pdf.

clusion from judicial review of action "committed to agency discretion." 5 U.S.C. § 701(a). Rather, contrary to the Fifth Circuit's holding, the ESA provides meaningful standards to review the Secretary's decision whether to exclude an area from designation. Given that the economic costs of critical habitat designation were one of Congress's primary concerns when crafting the critical habitat provisions, it stands to reason that Congress did not intend to exclude the implementation of those provisions from judicial review.

A. Critical Habitat Designation and Exclusion Decisions Are Not Wholly Committed to Agency Discretion and Are Reviewable.

Congress authorized review under the APA for a wide range of agency actions. 5 U.S.C. § 704. The APA, this Court has said, "creates a presumption favoring judicial review of administrative action." *Sackett* v. *EPA*, 566 U.S. 120, 128 (2012) (internal quotation marks omitted). By its terms, the APA provides a right to judicial review of all "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and applies universally "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* § 701(a). Neither of these narrow exceptions applies here, and "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict ... judicial review" of agency action. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967).

The Fifth Circuit's decision, that the Secretary's consideration of economic impacts in determining whether to exclude an area from designation is not reviewable because it is agency action committed to discretion by law, is incorrect as a matter of law. *Markle Interests, L.L.C.* v. *U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 474 (5th Cir. 2016), *cert. granted*, *Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Serv.*, 138 S. Ct. 924 (2018). The Secretary's decision does not fall within the APA's narrow exception for action "committed to agency discretion." As this Court has explained: "This is a very narrow exception ... The legislative history of the [APA] indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

This Court's decision in *Bennett* confirms that the Secretary's critical habitat decision, which is subject to the statutory provisions governing critical habitat designation, is "plainly ... of obligation rather than discretion: 'The Secretary *shall* designate critical habitat, and make revisions thereto, ... on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.'" *Bennett*, 520 U.S. at 172 (emphasis added); 16 U.S.C. § 1533(b)(2). The cited provision of the Act for designation decisions – which requires consideration of economic and other relevant impacts of designation – is followed by the stat-

utory direction that, except where extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat," but *only* "if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added).[7] The Act thus specifies a balancing test that must be employed when making an exclusion decision, which naturally should account for the economic and other relevant impacts of designation that the Secretary is required to consider.

While the Secretary has discretion in deciding whether to exclude an area from a critical habitat designation, plainly that discretion is constrained. Review of a critical habitat exclusion decision for abuse of discretion is well supported by the APA, which instructs courts to "hold unlawful and set aside agency action" that is "arbitrary, capricious, [or] an *abuse of discretion*." 5 U.S.C. § 706(2)(A) (emphasis added).

Judicial review is unavailable based on commitment to agency discretion *only* "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). Contrary to

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[7] Indeed, the *Bennett* Court concluded that the Secretary's ultimate decision on designation of critical habitat *is* reviewable for abuse of discretion and that, in arriving at his decision, the Secretary must "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available." *Bennett*, 520 U.S. at 172.

the Fifth Circuit's holding, there is a clear standard governing designation of critical habitat. Once the Services initiate rulemaking to designate critical habitat, the rulemaking will be subject to carefully prescribed requirements defined by Congress and by the Services. In addition, there is a clear standard governing the Secretary's determination whether to exclude an area from a critical habitat designation: such exclusion must be based on a determination "that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2). The Services' application of the ESA's statutory standard is thus readily subject to review under the APA.

B. Judicial Review Is Necessary to Ensure the Services Meet their Statutory Obligation to Consider the Economic Consequences of Critical Habitat Designations and Exclusions.

Congress specifically sought to balance "protect[ion] and manage[ment of] endangered and threatened species" and other national goals, including energy and economic development." Legislative History at 940. Judicial review of the Services' weighing of those priorities is essential. Critical habitat designations carry considerable regulatory burdens and corresponding economic consequences for landowners, companies, state and local governments, and others – and can be easily underestimated. Holding the Services to account for their decisions upon judicial review will help ensure the Services meet their statutory obligations.

1. The economic and regulatory burdens of designating critical habitat are substantial.

Once the Services propose a rule to designate critical habitat, landowners and others with an interest in the areas identified for critical habitat designation must participate in the rulemaking (as Weyerhaeuser and Markle did here) if they want to ensure that the Services consider impacts to those interests and other relevant information. 50 C.F.R. § 424.19 (addressing comment by members of the public who face negative consequences as a result of critical habitat designation).

Furthermore, under FWS's regulations, the mere *proposal* of critical habitat triggers ESA conference requirements for any federal agency action deemed "likely to ... result in the destruction or adverse modification of [the] proposed critical habitat." *Id.* § 402.10(a). Once critical habitat is designated, entities that own, permit, or have other interests in land designated as critical habitat face immediate and significant restrictions on their otherwise lawful use of that land; expensive and time-consuming new procedural requirements on ongoing and future projects; litigation risk; and significant diminution in the value of the property. *See* David Sunding, "The Economic Impacts of Critical Habitat Designation," Giannini Foundation of Agricultural Economics (undated), http://giannini.ucop.edu/media/are-update/files/articles/v6n6_3.pdf ("Sunding"). When an entity applies for a federal permit or if other fed-

eral action is proposed for activities within critical habitat, section 7 consultation is triggered.

The requirement to consult substantially increases the delay, cost, and uncertainty involved in securing approvals needed to complete a project. Applicants must dedicate staff resources and often must hire outside consultants and species experts to assist with consultation. For example, prior to consultation and permitting, a project applicant or its outside consultants will complete desktop and field surveys for species and critical habitat to analyze potential impacts. Both types of surveys provide a basis for route and site planning and can be used by project teams to avoid, minimize, and mitigate potential impacts on critical habitat.

As a result of section 7 consultation, permitting agencies and the Services may require additional mitigation or avoidance measures. In California, for example, FWS has required that three acres of vernal pools – ephemeral areas that are generally isolated and dry for most of the year – be created for every one vernal pool impacted. *See* Sunding at 8.

Section 7 consultation may force project proponents to redesign their project to avoid modification of areas deemed to be critical habitat. Adverse modification of critical habitat is prohibited absent an exemption from the "God Squad" (which is nearly never granted). 16 U.S.C. § 1536(a)(2). Project redesign often reduces the output of the project, imposes additional costs and uncertainty on project proponents and property owners, and has other impacts, includ-

ing causing a shortage of available land for important projects. Using the vernal pool example, additional section 7 consultation requirements consisted of avoidance of 85.7 percent of the site where vernal pools were located, allowing only 14.3 percent of the project site to be developed. *See* Sunding at 8. Likewise, here, FWS estimated that permit conditions requiring 60 percent of Unit 1 to be set aside as dusky gopher frog habitat would destroy $20.4 million of development value on that land. 77 Fed. Reg. at 35,140-41. If development were prohibited altogether, the loss would be $33.9 million. *Id.* at 35,141.

The section 7 consultation process often takes months or years, significantly delaying projects and resulting in substantial additional costs, if not destroying the projects' economic viability. Delay affects project developers by pushing project deliverables further into the future. Delay could impact *amici's* members' ability to undertake, for example, utility line and pipeline construction and maintenance, with potentially significant adverse impacts on their customers' access to reliable and secure energy supplies at a reasonable cost. Thus, for any proposed action that has a federal nexus, *amici's* members can be required to engage in lengthy and expensive consultation processes with the Services that may result in modification, delay, or other changes to their projects.

2. The designation of critical habitat can impose costs even where there is no federal nexus.

Designation of critical habitat can impose costs on project proponents even if their project is not within designated critical habitat at all. Significant time, expertise, and expense are required to determine whether a parcel may contain critical habitat, or whether a project may have offsite (or indirect) effects on critical habitat.

Critical habitat designation can also increase market prices for land not so designated (and, correspondingly, decrease the property value of land so designated). Designation thus may impede a project proponent from undertaking a particular enterprise or locating a facility where most needed, or may reduce the scope of a proposed project in order to stay within a budget, including critical and time-sensitive utility projects that have already been determined to be necessary and in the public interest. Designation can result in especially large costs where other numerous regulatory constraints bear on site selection. Moreover, critical habitat designations can create unfair economic advantages and disadvantages to companies within the same industry where, for example, one project is – and another project is not – subject to regulatory burdens from critical habitat designations.

3. Decisions to designate critical habitat have consequential impacts on land and water use nationwide.

The expanse of a critical habitat designation for any particular species can be extensive, and can overlap with critical habitat for other species, often covering thousands or millions of acres of land. As of January 2015, critical habitat has been designated for 704 of the more than 1,500 species listed as threatened or endangered. FWS, Endangered Species, Listing and Critical Habitat|Critical Habitat|Frequently Asked Questions, https://www.fws.gov/endangered/what-we-do/critical-habitats-faq.html (last visited Apr. 27, 2018). The Services can potentially designate critical habitat for any or all of these species, and any additional species listed in the future.

The total economic losses from critical habitat designations could be $1 million per acre of habitat conserved. *See* Sunding at 9. The process of land development and land use is complex, and numerous factors are involved. If land is set aside, or if the scale of the project is reduced, due to the presence of designated critical habitat, there could be market and regional effects from the designation. Other land will not necessarily be available or otherwise make up for project site reductions or losses due to critical habitat designations.

Thus, the consequences of designation of critical habitat multiplied by the number of species across the country for which critical habitat could be desig-

nated are vast, and decisions whether or not to designate a particular area as critical habitat will have important consequences for land use nationwide. The costs associated with designation of critical habitat are relevant both to the designation and to the decision whether to exclude certain areas, and demonstrate the importance of judicial review of these determinations for abuse of discretion.

III. The ESA's Other Habitat Conservation Mechanisms Underscore the Importance of Recognizing the Limits Congress Imposed on the Designation of Unoccupied Critical Habitat.

The Act establishes numerous conservation mechanisms outside of the designation of critical habitat. It encourages "States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs." 16 U.S.C. § 1531(a)(5). It authorizes or requires: acquisition of lands and waters to conserve listed species, *id.* § 1534(a); cooperative agreements between the Services and states for the administration and management of areas established for the conservation of listed species, *id.* § 1535(b); and federal agency programs for the conservation of listed species, *id.* § 1536(a)(1). The Act also creates strong incentives for private parties to conserve habitat by requiring the development and implementation of habitat conservation plans ("HCPs") in order to receive permits authorizing the incidental taking of listed species. *Id.* § 1539(a)(2)(A).

Amici's members are committed to minimizing impacts from their activities on the environment, including wildlife and habitat, through responsible planning, permitting, and practices, including under important ESA-based programs. A conservation plan can be developed by private entities either with no Service involvement, or in partnership with the Services for the purposes of obtaining an incidental take permit under section 10 of the ESA. Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, Notice of Final Policy, 81 Fed. Reg. 7226, 7229 (Feb. 11, 2016). Such partnerships include HCPs, candidate conservation agreements with assurances ("CCAAs"), and safe harbor agreements.

The Services support these public-private conservation partnerships because they implement conservation actions that the Services would be unable to accomplish without private landowners. *Id.* at 7230. Private parties participate in voluntary conservation measures to protect the species and their habitat at the outset, and thereby avoid unnecessary listings and designations of critical habitat. Indeed, voluntary conservation measures can provide equal or better protections without the burdens associated with an ESA listing and designation of critical habitat.

For these reasons, the Services have acknowledged that conservation plans and programs can warrant exclusion of an area from a critical habitat designation. In their final policy regarding how existing conservation plans and programs should be considered when determining whether to designate critical habitat, the Services recognized that on-the-

ground conservation actions that benefit species reduce the regulatory benefit of critical habitat designation because the designation may be redundant, or may provide little more conservation benefit compared to what is already being provided through the conservation plan or program. *Id.* at 7228. *See also Home Builders Ass'n of N. Cal.* v. *U.S. Fish & Wildlife Serv.*, No. Civ. S-05-0629 WBS-GGH, 2006 WL 3190518, at *31 (E.D. Cal. Nov. 2, 2006) ("[T]he designation of critical habitat is not only less powerful of a protection than an HCP, but also can adversely affect [local and private] partnerships ... by imposing duplicative regulatory burdens...."). These public-private partnerships, contemplated by the statute and regulations, thus promote conservation efforts that significantly reduce or eliminate the need for future listings and designations of critical habitat and should be encouraged.

The following examples of voluntary habitat conservation measures that *amici* and their members undertake to protect and benefit species and their habitat confirm that the ESA functions well to protect species, without any need to broadly designate vast unoccupied areas of land and water as critical habitat.

Voluntary Conservation Measures for the benefit of the Lesser Prairie-Chicken ("LPC"). Public and private stakeholders, including *amici* and their members, are implementing extensive and important voluntary conservation measures to ensure that the LPC and its habitat are protected, without any need for a listing under the ESA. Across multiple

states, there has been and continues to be substantial investment by a wide range of industry and local governments. Over 10 million acres (more than half of which is privately owned land) are currently under protections for the benefit of the LPC. Western Association of Fish and Wildlife Agencies ("WAFWA"), The 2015 Lesser Prairie-Chicken Range-wide Conservation Plan Annual Progress Report at 54, tbl. 13 (William E. Van Pelt ed., Mar. 2016). This huge swath of land grows each year, and the resources available to organizations, such as the WAFWA, to protect the LPC's habitat and range also grow.

The Range-wide plan, for example, represents a cooperative conservation effort by five states, state fish and wildlife agencies, stakeholders, and property owners, with input from the public and FWS. The Range-wide plan is a conservation strategy that provides the population and habitat needed to expand and sustain LPC. Under the Range-wide plan, private landowners, including *amici's* members, voluntarily enter into formal agreements, such as the WAFWA Conservation Agreement and various CCAAs with FWS to maintain and enhance land within the LPC range. Since the inception of the Range-wide plan, WAFWA has invoiced approximately $49.9 million in enrollment and impact fees, of which 87.5 percent, or $43.6 million, is restricted for conservation efforts. *Id.* at 85.

Voluntary conservation programs have helped protect LPC habitat, while improving habitat quality and connectivity, and contributing to the resiliency of the species. Indeed, survey results confirm that LPC

populations have stabilized and are growing in key areas, demonstrating that the LPC and its habitat are well protected without any listing of the species or designation of critical habitat. These areas also serve as key habitat for the dune sagebrush lizard and the Texas hornshell mussel, and thus provide additional species benefits.

HCP for the Florida scrub-jay ("FSJ"). The FSJ HCP provides a blueprint for public-private partnerships by which *amici's* members coordinate land management activities with state and local governmental agencies. As a result of the HCP and coordination, the FSJ metapopulation, which would have likely been extirpated, has been steadily increasing.

Gopher Tortoise Memorandum of Agreement ("MOA"). One of *amici's* members has recently entered into a MOA with the Florida Fish and Wildlife Conservation Commission to protect the state-listed gopher tortoise, considered a candidate species by the FWS, by placing conservation easements on over 1,000 acres of gopher tortoise habitat, with more lands to be permanently protected over the next 30 years. All lands preserved by conservation easements will be managed as gopher tortoise habitat in perpetuity. Through the course of the MOA, the company will place conservation easements on over 2,000 additional acres, and will provide millions of dollars to conservation groups performing land management on public and/or private lands in Florida.

Voluntary conservation measures, such as those undertaken by *amici's* members, often provide more protection than a critical habitat designation, without imposing unnecessary regulatory burdens. These efforts by the Services, states, local governments, and private partners thus demonstrate that overbroad designations of critical habitat are not necessary or appropriate. Indeed, such voluntary efforts should not be discouraged by any overly broad interpretation of the statute that would allow designation of uninhabitable areas as critical habitat.

The extent and value of other means Congress provided to conserve listed species and their habitat draws into sharp relief whether and when designation of unoccupied land (in this case uninhabitable land) as critical habitat is truly "essential" to taking conservation actions for a species – a question the Secretary elided for the dusky gopher frog.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

April 30, 2018

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No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION, CROPLIFE AMERICA, NATIONAL ALLIANCE OF FOREST OWNERS, AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici Curiae will address the following questions:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

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NMFS & FWS, *Interim Endangered and Threatened Species Recovery Plan Guidance*, § 1.1 (June 2010), https://www.fws.gov/endangered/esa-library/pdf/NMFS-FWS_Recovery_Planning_Guidance.pdf 22

INTERESTS OF THE *AMICI CURIAE*

The American Farm Bureau Federation (Farm Bureau), CropLife America (CLA), National Alliance of Forest Owners (NAFO), and National Mining Association (NMA) respectfully submit this brief as *amici curiae* in support of the Petitioner.[1]

The Farm Bureau is an independent, non-governmental, voluntary general farm organization with nearly six million member families in all 50 states and Puerto Rico. Established in 1919, the Farm Bureau's primary function is to advance and promote the interests and betterment of farming and ranching; the farming, ranching, and rural community; and the individual families engaged in farming and ranching. This effort involves protecting, promoting, and representing the business, economic, social, and educational interests of American farmers and ranchers.

CLA is a national, not-for-profit trade association that represents developers, manufacturers, formulators, and distributors of crop protection products and plant science solutions for agriculture and pest management in the United States. CLA's many registrant member companies produce pesticides registered with EPA for use in the United States under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of this brief.

NAFO is a trade association that represents owners and managers of over 80 million acres of private forests in 47 states. NAFO was incorporated in March 2008, and has been working aggressively since then to sustain the ecological, economic, and social values of forests, and to assure an abundance of healthy and productive forest resources for present and future generations.

NMA is the national trade association of the mining industry. NMA has more than 300 members, including those who produce most of the nation's coal, metals, industrial, and agricultural minerals. The mining industry has a broad impact on the national economy, generating nearly 1.9 million jobs and contributing $225 billion to the U.S. GDP and $45 billion in federal, state, and local taxes each year. A core mission of NMA is to promote practices that foster the environmentally sound development and use of mineral resources.

The *amici* have a substantial interest in this case because the designation of private property as critical habitat under the Endangered Species Act (ESA) is a remarkably intrusive action that imposes significant burdens on landowners and restricts their ability to fully utilize their property. The U.S. Court of Appeals for the Fifth Circuit endorsed an expansive interpretation of critical habitat by upholding the protection of an area that is not only unoccupied but also unsuitable and uninhabitable by the species. In doing so, the Fifth Circuit destroyed the statutory distinction between occupied and unoccupied critical habitat and contravened Congressional intent by granting the Secretary "virtually limitless" power to

designate critical habitat. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 651 (5th Cir. 2017) (Jones, J., dissenting from Denial of Rehearing En Banc). "[T]he ramifications of this decision for national land use regulation . . . cannot be underestimated." *Id.* at 637.

The specter created by the Fifth Circuit's erroneous interpretation of what qualifies as critical habitat is unremittingly chilling in its implications for ongoing activities on private property. This over-expansive interpretation of the ESA "imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting). A critical habitat designation can freeze the operations of property designated as critical habitat in perpetuity. While such restrictions are only triggered by a discretionary federal agency action subject to ESA Section 7 "consultation," 16 U.S.C. § 1536(a)(2), the nexus between federal agency actions and private land use is exceedingly broad, and includes Clean Water Act permitting, FIFRA pesticide registrations, financial assistance, and other programs from the National Resources Conservation Service, Small Business Administration loan guarantees, Federal Emergency Management Agency flood insurance, and other Army Corps of Engineers permits.

The consultation requirement imposes a federal management overlay upon private lands with significant regulatory and economic ramifications under the ESA. A private property owner is barred from

obtaining any discretionary federal permits, authorizations, funding, or other agency actions without first being subject to a review to ensure that there will be no destruction or adverse modification of critical habitat. Further, if the property owner's activities may adversely affect a threatened or endangered species or its critical habitat, those activities may be significantly curtailed or subject to conditions that impair the productivity and use of that property.

The *amici* have members that are engaged in timber, agriculture, mining operations, and other related activities on privately owned property. They will suffer economic injury and, in many instances, the deprivation of the use and enjoyment of their property due to the consequential restrictions on land use activities arising from a designation of their land as critical habitat. These impacts are not limited to the facts of this case, but are occurring nationwide through the increasing trend of geographically expansive critical habitat designations. These designations impose economic impacts of millions of dollars annually and, sometimes, result in the outright rejection or cessation of ongoing activities that serve the development needs of the Nation.[2] These restrictions

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[2] *See, e.g.*, 74 Fed. Reg. 52,300, 52,300 (Oct. 9, 2009) (designating all potential critical habitat for the green sturgeon would have annualized economic impact of $64 million to $578 million); 75 Fed. Reg. 63,898, 63,920 (Oct. 18, 2010) (potential incremental impacts of bull trout critical habitat estimated at $56.3 to $80.9 million over 20 years); 77 Fed. Reg. 71,876, 71,946 (Dec. 4, 2012) (northern spotted owl critical habitat could have up to a $6.4 million annual impact); 79 Fed. Reg. 54,782, 54,829 (Sept. 12, 2014) (Canada lynx critical habitat could have up to $805,000 annual cost).

and negative effects are even more alarming when, as here, the land is unoccupied by the relevant species and lacks the features making it viable habitat. This Court must restrain the "virtually limitless" power conferred by the Fifth Circuit, and restore the designation of critical habitat to the bounds that Congress intended and explicitly prescribed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress added a narrow definition of critical habitat to the ESA in 1978 to restrain the prevailing practice of designating expansive areas of land with no regard to what was actually necessary for species conservation. In doing so, Congress struck a balance between the need to protect habitat for threatened and endangered species and the need to ensure that the exercise of regulatory powers affecting the economic and productive use of land is wielded with focused circumspection.

The application of the ESA is triggered when the Secretary determines to list a species as either threatened or endangered. 16 U.S.C. § 1533(a)(1). Concurrent with a listing decision, to the maximum extent prudent and determinable, the Secretary shall "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A)(i) (emphasis added). The Secretary must base the designation on "the best scientific data available . . . after taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). The Secretary is authorized to exclude any area from critical habitat if "the benefits of such

exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless an exclusion would result in the extinction of the species concerned. *Id.*

Congress did not envision the designation of critical habitat "as far as the eyes can see and the mind can conceive." 124 Cong. Rec. 38,131 (1978). Rather, Congress crafted an "extremely narrow definition of critical habitat" that imposed clear standards and statutory boundaries to restrain the overbroad assertion of federal regulatory power. 124 Cong. Rec. 38,665 (1978). For occupied habitat, the designation of critical habitat is limited to "specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). For unoccupied habitat, Congress imposed a heightened standard—critical habitat only can be designated for "specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

A critical habitat designation triggers the application of Section 7 of the ESA, whereby a federal agency must "consult" with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) (collectively, the Services) on any action authorized, funded, or carried out that may affect

critical habitat.[3] 16 U.S.C. § 1536(a)(2). During consultation, if FWS or NMFS concludes that the action will destroy or adversely modify critical habitat, then a reasonable and prudent alternative (RPA) to the proposed action is developed to avoid the destruction or adverse modification.[4] *Id.* § 1536(b)(4)(A). A private party applicant or partner to the federal agency action must typically implement the RPA or be subject to denial of its application or project. These Section 7 consultations impose "[c]onsiderable regulatory burdens and corresponding economic costs [that] are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation." Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10,678, 10,680 (2013). Where the federal action authorizes some activity on private land, the costs are borne by the private party, not by the federal agency.[5]

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[3] The relevant regulations define "action" expansively to include the "granting of licenses, contracts, leases, easements, right-of-way, permits, or grants-in-aid" or "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (2017).

[4] If the action will cause the incidental take of a listed species, FWS or NMFS also will specify reasonable and prudent measures (RPMs) to minimize the impact of the taking. 16 U.S.C. § 1536(b)(4)(C)(ii). These RPMs impose terms and conditions that can impose further restrictions on the use of property.

[5] The costs of consultation include, for example, conducting biological surveys and assessments—including multiple site visits, hiring of technical experts, and subsequent analyses—which can reach hundreds of thousands of dollars. Compliance costs for measures to avoid or minimize the effects of the proposed action on

In the decision below, the closely divided Fifth Circuit panel upheld the designation of more than 1,500 acres of private forest land (Unit 1) in Louisiana as unoccupied critical habitat for the dusky gopher frog. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 459 (5th Cir. 2016). The FWS conceded that Unit 1 only contains one of the three physical or biological features that comprise habitat for the species (ephemeral ponds) and that, in its present state, Unit 1 is "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. 35,118, 35,129 (June 12, 2012); JA145 (emphasis added). Furthermore, Unit 1 is located about 50 miles from existing populations, and natural dispersal of frogs to the area is not possible. *See id.* at 35,130; JA145-46. Even if dusky gopher frogs were introduced into Unit 1, they would not survive.

The Fifth Circuit wrongly held that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations." *Markle*, 827 F.3d at 468. The plain language of ESA Section 4 explicitly limits critical habitat to a subset of "any habitat of such species." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). The Fifth Circuit's decision condones the designation of admittedly unsuitable and uninhabitable land based on the mere presence of one physical feature that, alone, cannot support the dusky gopher frog. This decision sets a remarkably low bar for the designation of critical habitat—there is no requirement for existing habitat,

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designated critical habitat areas can be crippling. The consultation process itself also has economic impacts because it "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." 43 Envtl. L. Rep. News & Analysis at 10,681.

no requirement for suitability, and no reasonable expectation that the area will be used for the conservation of the species.

The Fifth Circuit also "play[s] havoc with administrative law" by holding that FWS's decision not to exclude Unit 1 from designated critical habitat is unreviewable. *Markle*, 848 F.3d at 652 (Jones, J., dissenting). On the contrary, the Administrative Procedure Act (APA) provides a strong presumption of judicial review of final agency actions, including those that involve discretionary agency decision-making. While ESA Section 4(b)(2) contains a cost-benefit standard that applies to decisions on whether to exclude areas from critical habitat, the Fifth Circuit subverted this provision and acquiesced to the imposition of up to $34 million in economic costs with "virtually nothing on the other side of the economic ledger." *Id.* at 653. This is contrary to Congressional intent, and disregarded precedent from the Court concluding that such decisions are judicially reviewable for abuse of discretion.

ARGUMENT

I. Designation of Unoccupied Critical Habitat Requires that the Specific Areas Be Both Habitat for the Species and Essential to Its Conservation.

A. The ESA's Plain Language Limits Critical Habitat to Specific Areas Within Existing Habitat.

The decision below impermissibly authorizes the Secretary to designate almost any land or waterbody within the United States as critical habitat for an ESA-listed species, even in places where the species could not currently survive. The Fifth Circuit erroneously held, "[t]here is no habitability requirement in the text of the ESA or the implementing regulations." *Markle*, 827 F.3d at 468 (emphasis added). This conclusion contravenes the ESA's explicit statutory requirements.

Section 4 clearly delineates "critical habitat" as a subset of "habitat." The Secretary can only "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). Thus, "[w]hatever is 'critical habitat,' according to this operative provision, must first be 'any habitat of such species.'" *Markle*, 848 F.3d at 640 (Jones, J., dissenting). This "clear habitability requirement" dictates the scope of the narrower designation of occupied and unoccupied areas as critical habitat for a species.

The Court has emphasized, "[t]he starting point in discerning congressional intent is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). And, "when the statute's language is plain, the sole

function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* The use of "habitat" within Section 4 was purposeful and must be construed to have meaning. *E.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citation omitted). Because Congress used different terminology—"habitat" versus "critical habitat"—this Court must assume that different meanings were intended. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004). The only interpretation that gives this distinction any operative effect is if critical habitat is viewed as the "specific areas" within a species' broader habitat.

While not defined in the ESA, "habitat" is commonly understood to be:

> the resources and conditions present in an area that produce occupancy—including survival and reproduction—by a given organism. Habitat is organism-specific; it relates the presence of a species, population, or individual (animal or plant) to an area's physical and biological characteristics. Habitat implies more than vegetation or vegetation structure; it is the sum of the specific resources that are needed by organisms. Wherever an organism is provided with resources that allow it to survive, that is habitat.

Linnea S. Hall, *et al.*, *The Habitat Concept and a Plea for Standard Terminology*, 25(1) Wildlife Soc'y Bulletin 173, 175 (1997); John M. Frywell, *et al.*, *Wildlife Ecology, Conservation, & Mgmt.* 427 (3d ed. 2014) ("The place where an animal or plant normally lives, often characterized by a dominant plant form or physical characteristic (e.g. soil habitat, forest habitat).").

Furthermore, properly interpreted, habitat can only be designated as critical habitat if that habitat exists at the time of the designation. The ESA states that, to the maximum extent prudent and determinable, the Services shall "concurrently with making a determination . . . that a species is [endangered or threatened], designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This imposes a temporal requirement that an area must already possess the necessary physical or biological features comprising habitat for the species in order to qualify for the narrower critical habitat designation.[6] The Services cannot designate degraded or uninhabitable areas as critical habitat based on the possibility that sometime in the future those areas may somehow become habitat.[7] The habitat considered for

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[6] Under the ESA, the critical habitat designation is required to be made concurrent with listing a species, but may later be revised or updated pursuant to other provisions of the Act. In each instance, at the time the designation is made, the Services must determine what areas can be categorized as habitat for the species and what portions of those areas should be designated as critical habitat.

[7] The designation of critical habitat is subject to the requirement to use the best scientific data available, which ensures that the ESA is not "implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

designation must already exist and be capable of supporting the survival of the species.

For areas that are not currently occupied by the species, the requirement for habitability ensures that the designation of critical habitat and application of the ESA does not create illogical results. As in the present case, it is axiomatic that an area where the dusky gopher frog cannot survive (even if relocated there) cannot provide a conservation benefit to the species. By divorcing "habitat" from "critical," the Fifth Circuit's reasoning allows almost any area to be designated as critical habitat with no restrictions on scope or the attendant regulatory impositions on affected landowners. This is contrary to the explicit statutory safeguards that Congress provided.

B. Congress Intended to Limit Critical Habitat to a Subset of the Species' Habitat.

As enacted in 1973, the ESA did not contain a definition of critical habitat or specify how it was to be designated.[8] In 1978, the Services promulgated regulations that defined "critical habitat" as:

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[8] The only reference to critical habitat in the 1973 ESA was the prohibition on federal agencies taking action that "jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." Endangered Species Act of 1973, Pub. L. No. 93-205 § 7, 87 Stat. 884, 892. Congress intended that critical habitat would be acquired and protected pursuant to ESA Section 5. *Id.* § 5, 87 Stat. at 889; H.R. Rep. No. 93-740, at 25 (1973) ("Any effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire habitat which is critical to the survival of those species.") (emphasis added).

> any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. . . . Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

43 Fed. Reg. 870, 874-75 (Jan. 4, 1978) (emphasis added). Shortly thereafter, the Court enjoined construction of the nearly completed Tellico Dam Project to protect the endangered snail darter and prevent the destruction of its critical habitat. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."). In response to these events, and the expansive designation of critical habitat for other species,[9] Congress amended the ESA to explicitly define critical habitat and limit the scope of such designations to alleviate the resulting significant economic and regulatory impacts.

Congress's efforts demonstrate a clear intention that critical habitat designations are limited to areas that are habitable by the species and that unoccupied

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[9] For example, Congress was particularly concerned about a proposal to designate up to 10 million acres of Forest Service land as critical habitat for the grizzly bear. Much of the proposed designation was "not habitat that is necessary for the continued survival of the bear," but was being designated so that the present population "within the true critical habitat" could expand. S. Rep. No. 95-874, at 10 (1978).

habitat should only be designated sparingly based on heightened criteria. Notably, Congress recognized that an area must first be functioning habitat for a species before the more specific areas of critical habitat could be designated within that habitat. For example, as amended, House Bill 14104 defined unoccupied critical habitat as:

> specific areas periodically inhabited by the species which are outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act (other than any marginal habitat the species may be inhabiting because of pioneering efforts or population stress), upon a determination by the Secretary at the time it is listed that such areas are essential for the conservation of the species.

124 Cong. Rec. 38,154 (1978) (emphasis added). The House Committee on Merchant Marine and Fisheries noted that efforts to define critical habitat were driven by the concern that "the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat."[10] H.R. Rep. No. 95-1625, at 25 (1978) (emphasis added). Instead, the Committee directed the Secretary to "be exceedingly circumspect in the

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[10] During floor debate on House Bill 14104, Representative Bowen stated that "I believe the majority of the House is in agreement on that, that the Office of Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species." 124 Cong. Rec. 38,131 (emphasis added).

designation of critical habitat outside the presently occupied area of the species." *Id.* at 18 (emphasis added).

The corresponding Senate Bill 2899 also included a definition of unoccupied critical habitat, which limited it to:

> specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this act, into which the species can be expected to expand naturally upon a determination by the Secretary at the time it is listed, that such areas are essential for the conservation of the species.

124 Cong. Rec. 21,355 (1978) (emphasis added).[11] For unoccupied areas, the Senate Committee on Environment and Public Works stated that "[t]here seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species[']

[11] Regarding his amendment, Senator McClure explained that "this is in response to the difficulty of how large an area should there be established and if that species then expands beyond that area must humans then be displaced in that area." *Id.*

continued survival."[12] S. Rep. No. 95-874, at 10 (emphasis added).

The final bill passed by Congress included "[a]n extremely narrow definition of critical habitat, virtually identical to the definition passed by the House." 124 Cong. Rec. 38,665. That definition remains in effect today. The legislative history clearly demonstrates that Congress was focused on habitat of species which could then be designated as either occupied or unoccupied critical habitat if the area satisfied the relevant definitional criteria. *Markle*, 848 F.3d at 642 n.4 (Jones, J., dissenting) ("uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat"). Contrary to the Fifth Circuit's conclusion, this habitability requirement was understood by Congress at the outset and incorporated into the operative provisions of the ESA.

C. Designation of Unoccupied Habitat Is a More Demanding Standard that Requires the Entire Area to be Essential for the Conservation of the Species.

The Fifth Circuit found that "only occupied habitat must contain all of the relevant [physical or biological

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[12] In explaining the role of critical habitat, Senator Garn stated that "[w]hen a Federal land manager begins consideration of a project, or an application for a permit, it is essential that he know, not only of the existence of an endangered species, but also of the extent and nature of the habitat that is critical to the continued existence of that species. Unless he knows the location of the specific sites on which the endangered species depends, he may irrevocably commit Federal resources, or permit the commitment of private resources to the detriment of the species in question." 124 Cong. Rec. 21,575 (1978) (emphasis added).

features]," and upheld the designation of the unoccupied Unit 1 despite it only containing one of the three features that are essential to the conservation of the species. *Markle*, 827 F.3d at 468 & 472 n.20. The decision illogically establishes that the same conditions—a lack of all relevant physical or biological features—can justify the designation of an unoccupied area, but not an occupied area, as critical habitat. This is contrary to Congressional intent and erroneously lowers the bar for designating unoccupied critical habitat.

The ESA, its legislative history, and court precedent all unquestionably demonstrate that "an unoccupied critical habitat designation was intended to be different from and more demanding than an occupied critical habitat designation." *Markle*, 848 F.3d at 648 (Jones, J., dissenting). In defining critical habitat, Congress explicitly distinguished between occupied and unoccupied habitat. Occupied habitat requires the presence of "features [that are] essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Conversely, unoccupied habitat requires "specific areas . . . [that] are essential to the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). From a biological perspective, the use of "features" for occupied habitat and "areas" for unoccupied habitat is inherently logical. An already occupied area is, by definition, habitat for the species, so a focus on physical or biological features ensures that the critical components of that habitat are identified. Because unoccupied areas may or may not have habitat, the analysis must expand beyond mere features to consider the habitability of the area as a

whole, otherwise the designation would provide no conservation benefit to the species.

The use of these disparate statutory terms—"features" versus "areas"—clearly connotes that different standards apply to the designation of occupied and unoccupied habitat. *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citation omitted). To give these terms independent meaning, the designation of unoccupied habitat must require more than the presence of a single feature.

Disregarding this statutory construct, the Fifth Circuit contradicted all relevant precedent by making "it easier to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." *Markle*, 848 F.3d at 646 (Jones, J., dissenting). In contrast, the U.S. Court of Appeals for the Ninth Circuit has stated:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1163 (9th Cir. 2010); *see also Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010) (designation of unoccupied habitat "is a more demanding standard than that of occupied critical

habitat"). Numerous district courts also have concluded that the designation of unoccupied habitat requires more than the standard for designating occupied areas. *E.g.*, *Cape Hatteras Pres. All. v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential"); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("ESA imposes a more onerous procedure on the designation of unoccupied areas"); *Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("more demanding [standard] than that of unoccupied habitat"). The Fifth Circuit's anomalous decision is contrary to established case law, and subverts Congressional intent and the ESA statutory criteria which impose a heightened standard for the designation of unoccupied critical habitat.[13]

The Fifth Circuit's decision extinguished the statutory criterion that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The purposeful use of "essential" should not be ignored. To be "essential," the designated habitat must be "of the utmost importance"

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[13] In adopting the definition of "critical habitat," Congress sought to constrain the ability of the Secretary to designate unoccupied habitat. The Senate found that there is "little or no reason to give exacti the same status to lands needed for population expansion as is given to those lands which are critical to a species[']s continued survival." S. Rep. No. 95-874, at 10 (emphasis added). Likewise, the House directed the Secretary to be "exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (emphasis added).

or "indispensable" for the conservation of a species. *Merriam-Webster's Collegiate Dictionary* 427 (11th ed. 2005). Congress clearly understood that its use of "essential" would impose a stringent limitation on the areas that could be designated as critical habitat.[14] The operative effect of this term is particularly apparent where, as here, the unoccupied area is not connected to occupied areas, would require extensive modifications and annual maintenance to become suitable habitat, and is not subject to current or anticipated restoration efforts or conservation measures. *Markle*, 827 F.3d at 481 (Owens, J., dissenting). By upholding the designation of Unit 1, the Fifth Circuit removed any principled limitation on the Secretary's ability to designate critical habitat and rendered this authority "virtually limitless."[15] *Markle*, 848 F.3d at 649-51 (Jones, J., dissenting). This is contrary to what Congress intended and what the ESA explicitly commands.

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[14] As Representative Duncan explained, "I think that in order to be consistent with the purposes of this bill to preserve critical habitat that there ought to be a showing that it is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it." 124 Cong. Rec. 38,154 (emphasis added).

[15] In part, the Fifth Circuit justified its decision based on a then-existing regulatory requirement that the Secretary could only designate an unoccupied area as critical habitat "when a designation limited to its present range would be inadequate to ensure the conservation of the species." *Markle*, 827 F.3d at 470 (citing 50 C.F.R. § 424.12(e)). The Services subsequently deleted this requirement from their regulations. *See* 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016).

D. Congress Provided Other Mechanisms for the Identification and Protection of Areas that May Later Become Habitat and Provide Benefits to a Species.

Congress did not intend for a critical habitat designation to be the sole mechanism by which the Services would attempt to identify and protect uninhabitable areas that may someday benefit a species. Instead, the ESA provides other statutory mechanisms to achieve that function.

First, the Services are required to develop and implement recovery plans for listed species. 16 U.S.C. § 1533(f)(1). In particular, these recovery plans describe the "site-specific management actions" that are necessary to achieve the conservation and survival of the species. *Id.* § 1533(f)(1)(B)(i). While not imposing mandatory obligations, recovery plans identify proactive measures, such as the ecological restoration of habitat or implementation of conservation measures, that can be undertaken by the Services or other stakeholders to achieve a species' recovery.[16]

Second, under ESA Section 5, the Secretary can acquire land, irrespective of whether it qualifies as habitat, to conserve listed species. 16 U.S.C. § 1534(a)(2) (authorization "to acquire by purchase, donation, or otherwise, lands, waters, or interest therein" to conserve fish, wildlife, and plants). As the

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[16] NMFS & FWS, *Interim Endangered and Threatened Species Recovery Plan Guidance*, § 1.1 (June 2010), https://www.fws.gov/endangered/esa-library/pdf/NMFS-FWS_Recovery_Planning_Guidance.pdf.

Court has recognized, this authority may be "useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species." *Babbitt*, 515 U.S. at 703 (emphasis added).

Finally, a critical habitat designation is not a singular, determinative action that is only taken concurrent with the listing of a species and never re-visited. In fact, the Services "may, from time-to-time thereafter as appropriate, revise such designation." 16 U.S.C. § 1533(a)(3)(A)(ii). A revision to critical habitat also can be initiated by a petition from an interested person. *Id.* § 1533(b)(3)(D). Thus, while an area that is uninhabitable at the time of listing (such as Unit 1 in the present case) cannot be designated as critical habitat, nothing in the ESA precludes the ability to designate that area in the future if and when it becomes habitat and satisfies the additional requirements for occupied or unoccupied critical habitat.

II. Judicial Review Applies to Decisions Not to Exclude Areas from Critical Habitat.

The Fifth Circuit's decision undermines a crucial provision of the ESA, and leaves affected landowners with no judicial recourse to challenge the non-exclusion of an area from critical habitat when there are disproportionate impacts. The ESA mandates that FWS "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2) (emphasis added). Based on this consideration, FWS "may exclude any area from critical habitat if he determines that the benefits of

such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (emphasis added). The ESA prevents FWS from excluding areas from critical habitat only if it "will result in the extinction of the species concerned." *Id.* Thus, the consideration of economic impacts, and whether to exclude an area from critical habitat based on such impacts, is an essential component of the Services' designation of critical habitat.

Based on a misinterpretation of the statute, the Fifth Circuit concluded that a decision not to exclude an area from critical habitat is committed to agency discretion by law and is therefore unreviewable. *Markle*, 827 F.3d at 473 (citing 5 U.S.C. § 701(a)(2)). The Fifth Circuit found that "Section 1533(b)(2) articulates a standard for reviewing [FWS's] decision to exclude an area [but] is silent on a standard for reviewing [FWS's] decision to not exclude an area." *Id.* at 474 (emphasis in original).

The ramifications of the Fifth Circuit's decision have significant consequences. The landowners could suffer up to $34 million in economic costs with "virtually nothing on the other side of the economic ledger." *Markle*, 848 F.3d at 653 (Jones, J., dissenting). However, these and other similarly situated landowners are now foreclosed from seeking judicial review in such circumstances. This outcome "play[s] havoc with administrative law." *Id.* at 652.

A. The Fifth Circuit Disregarded the Strong Presumption of Judicial Review of Administrative Action.

Based on the use of the permissive word "may," the Fifth Circuit concluded that a decision not to exclude an area from critical habitat is committed to agency discretion and therefore unreviewable.[17] The Fifth Circuit stated that Section 4(b)(2) "establishes a discretionary process by which [FWS] may exclude areas from designation, but it does not articulate any standard governing when [FWS] must exclude an area from designation." *Markle*, 827 F.3d at 474 (emphasis in original). Finding "no meaningful standard against which to judge the agency's exercise of discretion," the Fifth Circuit concluded that judicial review was unavailable. *Id.* at 473 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). The Fifth Circuit's holding is contrary to the strong presumption of judicial review under both the APA and this Court's precedent.

With limited exceptions, the APA provides a right of judicial review of all "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. In construing the scope of the APA, the Court has found that it "manifests a congressional intention that it cover a broad spectrum of administrative actions," and that its "'generous review provisions' must be given a 'hospitable' interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967) (citation omitted). Accordingly, "only upon a showing

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[17] The Fifth Circuit found that the ESA only "explicitly mandates 'consideration' of 'economic impact,'" which FWS satisfied by the commissioning of an economic report. *Markle*, 827 F.3d at 474 (citation omitted).

of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141. Recognizing that Congress rarely intends to preclude the enforcement of its directives to federal agencies, the Court has repeatedly reaffirmed that the APA creates "a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citation omitted).

The Fifth Circuit based its holding on the APA provision that prevents judicial review when the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). However, "[t]his is a very narrow exception." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). Based on the legislative history of the APA, the Court found that it is only applicable "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* (citing S. Rep. No. 79-752, at 26 (1945)) (emphasis added).

The Fifth Circuit erroneously relied on the Court's decision in *Heckler* to support its broad interpretation of the APA exemption. In *Heckler*, the Court found that an agency's decision not to take enforcement action under the Federal Food, Drug, and Cosmetic Act was unreviewable because such a decision "has traditionally been 'committed to agency discretion.'" *Heckler*, 470 U.S. at 831-32 (recognizing the "general unsuitability for judicial review of agency decisions to refuse enforcement"). The Court noted that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830.

However, *Heckler* only establishes the presumption of unreviewability in the context of enforcement actions. Even then, the Court found that it may be rebutted "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833 ("Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers").[18]

The Fifth Circuit's reliance on *Heckler* also fails because a refusal to take enforcement action cannot be conflated with a refusal to exclude an area from critical habitat. As the Court stated, "when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832 (emphasis in original). Here, FWS's decision not to act on a critical habitat exclusion yields the opposite result—the area is included within designated critical habitat and subject to the imposition of burdensome permitting requirements and federal agency restrictions. This is the same coercive power that justifies judicial review according to the Court's *Heckler* decision.

The Court has not expanded the scope of the APA's "committed to agency discretion" standard such that it would include a decision not to exclude an area from

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[18] "If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision 'committed to agency discretion by law' within the meaning of that section." *Heckler*, 470 U.S. at 834-35.

critical habitat. Instead, the Court has identified other narrow categories of administrative decisions that have traditionally been deemed discretionary and therefore unreviewable. *See, e.g., ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (agency's refusal to grant reconsideration of an action because of material error); *Webster v. Doe*, 486 U.S. 592, 599-601 (1988) (decision to terminate an employee in the interests of national security); *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (agency's allocation of funds from a lump-sum appropriation). Outside of these delineated circumstances, the Court has continued to apply its presumption of judicial review of agency action. *E.g., U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816 (2016) (noting "APA's presumption of reviewability for all final agency action") (citation omitted).

Contrary to the Fifth Circuit's interpretation, the use of the word "may" is not dispositive and does not negate the presumption of reviewability. Focusing on the use of "may," the Fifth Circuit concluded that this permissive language made the agency's decision not to act "presumptively unreviewable." *Markle*, 827 F.3d at 474 (citing *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015)). However, the Court has previously rejected arguments that the use of permissive terms commits a matter exclusively to agency discretion. *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("the permissive term 'as he may deem proper,' by itself, is not to be read as a congressional command which precludes a judicial determination of the correct application of the governing canons"); *Mulloy v. United States*, 398 U.S. 410, 414-15 (1970) (provision that Selective Service board "may reopen" draft

classification does not allow arbitrary refusal to reopen when applicant establishes a prima facie case for a new classification).[19] Thus, while the word "may" suggests some discretion, there is no indication in the statute that the Services have absolute discretion to determine whether to exclude an area from critical habitat. *Bennett*, 520 U.S. at 172 ("Secretary's ultimate decision is reviewable only for abuse of discretion"); 5 U.S.C. § 706(2)(A) (reviewing court can set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

B. Congress Provided Clear and Meaningful Standards for the Exclusion of Areas from Critical Habitat.

The imposition of draconian economic costs for minimal conservation gain motivated Congress to amend the ESA to include consideration of economic impacts and the authority to revise a critical habitat designation. Pursuant to the Fifth Circuit's holding, the Services would have unfettered and unreviewable discretion to determine whether to exclude an area from critical habitat, irrespective of whether the impacts of the designation significantly outweigh the benefits to the species. By shielding these decisions from judicial review, the Fifth Circuit disregarded the ESA statutory

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[19] *See also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) ("[w]hen a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show deference to the agency's determination. However, such language does not mean the matter is committed exclusively to agency discretion.") (emphasis in original).

constraints that Congress put into place to guide and restrain the scope of the Services' discretionary power, and reduced the mandatory consideration of economic and other impacts to a meaningless exercise.

As enacted in 1973, the ESA did not include a provision for excluding areas from critical habitat. The significant repercussions of the lack of any qualifying language were made clear by the Court's decision in *TVA*, which found "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." *TVA*, 437 U.S. at 185 (emphasis added). The Court stated that the plain language of the ESA "admits of no exception," *id.* at 173 (emphasis added), and that endangered species were to be protected "whatever the cost." *Id.* at 184.

Responding directly to the *TVA* decision, and to expansive designations of critical habitat, Congress amended the ESA in 1978 to provide the Services with the flexibility to consider economic impacts that the Court had previously found lacking.[20] In relevant part,

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[20] H.R. Rep. No. 95-1625, at 14 ("The bill attempts to retain the basis integrity of the [ESA], while introducing some flexibility which will permit exemptions from the Act's stringent requirements."); 124 Cong. Rec. 38,122-23 (1978) (Congress sought to revise the ESA to "take into consideration more accurately the development needs of this Nation" and, while protecting and preserving endangered species, "provide[] an opportunity for human growth, development, and progress, which we feel is an absolutely vital consideration.") (statement of Rep. Bowen); *id.* at 38,138 ("The amendments to the act, for the first time, recognize that there are human considerations to be dealt with and people are an important factor in this equation.") (statement of Rep. Burgener).

the statutory authority to exclude an area from critical habitat stated:

> In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.[21]

Given the consideration of economic impacts, and the authority to revise a critical habitat designation based on this consideration, this was viewed by some as "the most significant provision in the entire bill." 124 Cong. Rec. 38,666 (1978) (statement of Rep. Murphy).

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[21] Pub. L. No. 95-632 § 11(5), 92 Stat. 3751, 3766 (1978). In the 1982 amendments to the ESA, Congress made its penultimate revisions to Section 4(b)(2) to reflect what is essentially its present structure. In doing so, Congress reiterated the importance of economic considerations for critical habitat designations. H.R. Rep. No. 97-567, at 12 (1982) ("Desirous to restrict the Secretary's decision on species listing to biology alone, the committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests."). In 2003, the National Defense Authorization Act amended Section 4(b)(2) to explicitly include consideration of "the impact on national security." Pub. L. No. 108-136 § 318(b), 117 Stat. 1392, 1433 (2003).

One of the primary purposes of the amendment was to ensure the consideration of economic impacts in the designation of critical habitat. *See* H.R. Rep. No. 95-1625, at 17 ("Up until this time, the determination of critical habitat has been purely a biological question. With the addition of this new paragraph, the determination of critical habitat . . . takes on significant added dimensions."). Specifically, Congress explained that "[e]conomics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species." *Id.* Within the scope of this mandatory consideration of economic and other impacts, Congress provided the Services with flexibility in determining the weight and priority to afford the relevant impacts. *Id.* ("The consideration and weight given to any particular impact is completely within the Secretary's discretion"). However, this discretion does not obviate the requirement that the Services consider economic impacts at the time of a critical habitat designation.

In addition, Congress authorized the Services to modify a proposed critical habitat designation when the economic benefits of excluding a portion of the critical habitat outweigh the benefits of designating the area as part of the critical habitat. As Congress explained,

> Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of [a species]. The committee expects that in some situations, the resultant critical habitat will be different from that which would have been established using solely

> biological criteria. In some situations, no critical habitat would be specified.

Id. (emphasis added). The purpose of this authorization is to "cause the Secretary to be more judicious in specifying such a critical habitat," and to avoid conflicts between [species] and Federal activities at an early stage. 124 Cong. Rec. 38,128 (1978); H.R. Rep. No. 95-1625, at 16.

Seeking to harmonize species conservation with the Nation's development needs, Congress revised the criteria for the designation of critical habitat to include a mandatory consideration of economic and other impacts associated with the inclusion of a particular area as critical habitat. To ensure that this consideration of impacts was actually applied in the designation process, Congress also included a balancing test whereby the Services would determine whether to exclude an area from critical habitat (i.e., if the benefits of exclusion outweigh the benefits of inclusion), limited only by the obligation to ensure that the exclusion did not result in the extinction of the species. Rather than instilling the Services with absolute discretion regarding the final scope of a critical habitat designation, these standards were intended to direct the Services in the exercise of their authority to exclude areas from critical habitat. Indeed, contrary to the Fifth Circuit's decision, the fundamental purpose of these amendments was to ensure that the Services designate critical habitat more judiciously and alleviate the economic and other impacts resulting from more expansive or unfounded designations.

C. The Court Has Already Recognized that Judicial Review Applies to Decisions under ESA Section 4(b)(2).

The Fifth Circuit's holding that a decision not to exclude critical habitat is unreviewable clashes with the Court's decision in *Bennett*, 520 U.S. 154. There, the Court determined that ESA Section 4(b)(2) is not wholly discretionary and therefore incapable of judicial review under the APA. *Id.* at 172. The Fifth Circuit failed to address, let alone reconcile, this component of the *Bennett* decision. *Markle*, 848 F.3d at 654 (Jones, J., dissenting).

In *Bennett*, the Court considered a challenge to a biological opinion pursuant to the ESA citizen suit provision based, in part, on the argument that it was an implicit critical habitat determination in violation of the requirements of Section 4(b)(2).[22] The government sought to dismiss the claim by asserting that the Secretary's duties were discretionary. Rejecting that assertion, the Court stated that "the terms of § 1533(b)(2) are plainly those of obligation rather than discretion." *Bennett*, 520 U.S. at 172. While noting the statutory distinction between the mandate to consider economic and other impacts and the permissive authority to exclude any area from critical habitat, the Court did not find this to be dispositive. On the contrary, the Court concluded "the fact that the Secretary's ultimate decision is reviewable only for

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[22] In part, the ESA citizen-suit provision allows any person to commence a civil suit against the Secretary "where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C) (emphasis added).

abuse of discretion does not alter the categorical requirement that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (emphasis omitted).

Bennett confirms that a decision on whether or not to exclude an area from critical habitat is judicially reviewable under the APA. The Services cannot ignore the required procedures of decision-making and must consider the economic and other impacts of a critical habitat designation. While the ultimate decision on excluding a particular area entails some discretion, the Court concluded that it is reviewable under the APA's abuse of discretion standard.

The ability to seek judicial review of a decision not to exclude critical habitat is a necessary protection of the interests of private property owners. Section 4(b)(2) is the singular instance where Congress explicitly directs the Services to consider and ameliorate the economic and regulatory burdens associated with a decision under the ESA. However, with no judicial recourse, affected property owners are at the mercy of "agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 177. The result, as exemplified by this case, is the irrational imposition of millions of dollars in economic costs with no corresponding demonstrable conservation benefit to the species. Judicial review provides the indispensable mechanism for property owners to restrain this arbitrary exercise of administrative power.

CONCLUSION

For the foregoing reasons, the *amici* respectfully request that the decision of the Fifth Circuit be reversed.

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No. 17-71

In the
Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA BUSINESS PROPERTIES ASSOCIATION, CALIFORNIA FORESTRY ASSOCIATION, AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER WEYERHAEUSER COMPANY AND RESPONDENTS MARKLE INTERESTS, LLC, ET AL.

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QUESTION PRESENTED

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

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IDENTITIES AND INTERESTS OF AMICI CURIAE

Building Industry Legal Defense Foundation, California Cattlemen's Association, California Business Properties Association, California Forestry Association, and California Chamber of Commerce submit this brief *amicus curiae* in support of Petitioner Weyerhaeuser Company and Respondents Markle Interests, LLC, et al.[1]

The Building Industry Legal Defense Foundation ("BILD") is a non-profit mutual benefit corporation and a subsidiary of the Building Industry Association of Southern California, Inc. ("BIASC"). BIASC represents approximately 1,200 member companies across Southern California that are active in all aspects of the building industry, including land developers; builders of housing, commercial, and infrastructure; and architects, engineers, planners, contractors, and suppliers. The purposes of BILD are, in part, to initiate or support litigation or agency action designed to improve the business climate for the building industry and to monitor government regulation critical to the industry.

California Cattlemen's Association is the preeminent organization of cattle grazers in

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[1] The parties have filed a blank consent to the filing of *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

California, and acting in conjunction with its affiliated local organizations, it endeavors to promote and defend the interest of the livestock industry. Formed in 1917 as a non-profit trade association, the Cattlemen's Association promotes the interests of ranchers both large and small in California. Beef cattle producers operate on over 38 million of California's 100 million acres. The Cattlemen's Association has 35 local cattlemen's association affiliates that serve as a strong link between the grassroots membership and the association. The Cattlemen's Association represents its members' interests before the California State Legislature, Congress, and federal and state regulatory agencies on a wide range of issues including federal lands grazing fees and regulation, wetlands, conservation programs, air quality, wildlife management, parcel fees, and other issues affecting the use and ownership of California's rangelands.

California Business Properties Association ("CBPA") is a commercial real estate trade association that serves as the legislative and regulatory advocate for property owners, tenants, developers, retailers, contractors, land-use attorneys, brokers, and other professionals in the commercial real estate industry. With over 10,000 members, CBPA is the largest consortium of commercial real estate professionals in California. Its members range from some of America's largest retailers and commercial property owners and tenants, to individual and family-run commercial real estate interests.

California Forestry Association is a nonprofit, nonpartisan organization dedicated to sustainable

uses of renewable resources and responsible forestry. Association membership includes forest land owners, forestry professionals, loggers, manufacturers, wholesalers, and retailers who are engaged in the production and distribution of wood products. These members own 3.8 million of the 7.4 million acres of private forest land in California and are committed to protecting and enhancing the natural life cycle of California's forests. They also supply wood resources by contracting to purchase and harvest significant amounts of timber from public lands, including the national forests.

The California Chamber of Commerce ("CalChamber") is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before federal and state courts by filing amicus curiae briefs and letters in cases, like this one, involving issues of paramount concern to the business community.

Amici represent a broad cross-section of those individuals and businesses who own, lease, and make productive use of private lands in California. As a consequence, they are deeply concerned about the proper scope of the power of the United States Fish

and Wildlife Service ("FWS" or "Service") under the Endangered Species Act to designate private property as "critical habitat" for protected species. If, as the Fifth Circuit Court of Appeals in this case held, the FWS has the authority to impose a "critical habitat" designation even on property that is not habitat for any protected species—and is not even suitable for that purpose— then Amici's members face increasing regulatory burdens on and uncertainty over their ability to use and develop their properties.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Endangered Species Act ("ESA") requires the FWS[2] to identify and list endangered and threatened animals and plants. 16 U.S.C. § 1533(a)(1). The listing of an animal species triggers the Service's statutory obligation to designate "critical habitat" for that species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A)(i). In this case, a panel of the Fifth Circuit upheld the Service's designation of private land in Louisiana as "critical habitat" for a listed species despite the fact

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[2] The United States Department of Interior's FWS and the United States Commerce Department's National Marine Fisheries Service ("NMFS") both administer the ESA. The FWS has primary responsibility for terrestrial and freshwater wildlife, like the Dusky Gopher Frog here, while NMFS has jurisdiction over marine wildlife. For simplicity's sake, this brief refers only to FWS given that the case involves a species within its jurisdiction, but the same principles discussed herein apply to NMFS.

that the land is uninhabited—and uninhabitable—by that species.

All of the known Dusky Gopher Frogs live in Mississippi more than 50 miles away from the Louisiana land at issue. *See* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35118, 35146 (June 12, 2012) (showing map of critical habitats). The Service could not relocate the frogs onto the Louisiana land without the landowner's consent, *see id.* at 35,123, and the landowners have consistently explained that they do not and will not consent. *See Markle Interests, L.L.C. v. United States Fish & Wildlife Serv.*, Case No. 14-31008, Doc. 00512856810, Joint Brief of the Appellants at 7 n.2 (quoting public comments). Further, if the frogs somehow ended up on the Louisiana land as it exists today, they would die. *See* Final Rule, 77 Fed. Reg. at 35,129. Nonetheless, the Louisiana land was designated as "essential" to the species' conservation, imposing substantial costs on the landowners—$34 million by the Service's calculation—and creating a precedent that puts virtually all United States land at risk of designation. *See* 77 Fed. Reg. 35118, 35141; *Markle Interests, L.L.C. v. United States Fish & Wildlife Serv.*, 848 F.3d 635, 637 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc).

Drawing partly on the California experience, the first and second parts of this brief describe the impacts on landowners and consumers that will result from a federal power to designate *non-habitat* as "critical habitat" for protected species. The Service routinely assures private landowners that

designations of their property as "critical habitat" do not affect their land ownership or establish a refuge, wilderness, reserve, preserve or other conservation area. *See, e.g.*, United States Fish and Wildlife Service, *Critical Habitat under the Endangered Species Act* (June 13th, 2017) https://www.fws.gov/southeast/endangered-species-act/critical-habitat/. It emphasizes that such designations do not allow the federal government or the public to access their lands, and do not result (at least automatically) in closure of the designated area to private use and development. *Id.* At worst, the Service claims, a "critical habitat" designation affects only projects on private lands requiring federal action that may adversely modify the designated critical habitat, *e.g.*, projects requiring a federal permit, a federal license, or federal funding. *Id.* In that case, the federal agency undertaking the action must consult with the Service to avoid jeopardizing the existence of listed species and their critical habitat.[3]

The Service's narrative masks the harsh reality faced by developers, businesses, ranchers, foresters and others with a "critical habitat" designation on their land. First, as federal permitting jurisdiction has expanded over the last several decades, so too have the circumstances under which federal agencies need to consult with the Service to ensure that use

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[3] According to the Service's representations at oral argument before the Fifth Circuit, there is virtually no effect on the land *until* the landowner receives a determination by the Service or the U.S. Army Corps of Engineers that a proposed development qualifies as an "adverse modification." And at that point, the Service offered, the landowner could challenge the adverse modification determination.

and development of the property are limited to avoid adverse modification to any critical habitat. And second, the designation itself is costly in terms of additional permitting impediments and decreased land value. Those are on top of the costs of the consultation process itself. *See* Lawrence R. Liebesman & Rafe Petersen, *Federal Agency Consultation and Recovery Planning Under The Endangered Species Act*, SL091 ALI-ABA 327, 333 (June 2006) ("The consultation process can be lengthy and complex with extensive negotiations between a project applicant, the Corps and the FWS.").

The third part of this brief discusses how federal designations of non-habitat are both duplicative of and inimical to state and local efforts, and private initiatives, to conserve species. "Regulation of land use" is "a quintessential state and local power." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality). With the discretion to designate even *non-habitable* land as "critical habitat," the Service's power and influence over private property in the United States will rise to an unprecedented level—far beyond what Congress contemplated or the Constitution permits. Indeed, nowhere does the ESA contain the "clear and manifest statement from Congress" that is expected when statutes authorize an "unprecedented intrusion" into an area of "traditional state authority" such as land-use regulation. *Id.* (internal quotation and citation omitted). California is a case in point. With the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 (West 2018) ("CEQA"), the California Coastal Act, Cal. Pub. Res. Code § 30000 (West 2018) ("CCA"), the California Endangered Species Act, Cal. Fish & Game Code

§ 2050 (West 2018) ("CESA"), and a potpourri of other environmental statutes, California—and many other states like it—are well-equipped to balance important economic interests (such as the need to address the critical shortage of housing), and the state's interest in protecting threatened and endangered animals on private lands.

What's more, the private sector has begun supporting conservation initiatives in new and more significant ways. *See, e.g.*, Laura Huggins, *Contracting for Conservation*, Property and Environment Research Center (Sept. 14, 2017), https://www.perc.org/2017/09/14/contracting-for-conservation/. Private entities that historically may have resisted conservation efforts are now aligned with those efforts. Affirming the Service's unlimited "designation" power threatens to reverse the organic trend of state, local and private efforts to deal with quintessentially local concerns.

Finally, given its limited resources, the Service can barely pursue its statutory priorities. Indeed, as the countless lawsuits against it over the years show, the Service finds it challenging even to meet the most basic deadlines for completing "status reviews" of listed species every five years and other obligations. Candee Wilde, Note, *Evaluating the Endangered Species Act: Trends in Mega-Petitioners, Judicial Review, and Budget Constraints Reveal a Costly Dilemma for Species Conservation*, 25 Villanova Envtl. L.J. 307, 321-23 (Jan. 1, 2014). The last thing the Service needs is the power to pursue low-priority objectives—like searching for, and designating as "critical habitat," land that does not host and is

inhospitable to any protected species. Such new power can be expected to create a new cottage industry of litigation against the Service, thereby further undermining the agency's more important priorities.

For all these reasons, the Fifth Circuit's decision should be reversed, and the Service's power limited to designating *actual* habitat that is critical to a listed species.

ARGUMENT

I. DESIGNATIONS OF ACTUAL HABITAT ALREADY IMPOSE SUBSTANTIAL RISKS AND COSTS ON SOCIETY AS A WHOLE; RAMPANT DESIGNATIONS OF *NON-HABITAT* WOULD DRAMATICALLY WORSEN THOSE RISKS AND COSTS

As alluded to above, the Service's designation of land as "critical habitat" is legally consequential. Section 7 of the ESA requires that federal agencies ensure that their "actions" are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). "Actions" are defined as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas," and include "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." 50 C.F.R. § 402.02. Thus, the range of federal actions that can trigger consultation is extraordinarily broad.

Under Section 7, federal agencies must consult with the Service on any actions that may affect listed

species and their habitats to ensure that reasonable and prudent measures will be undertaken to mitigate impacts on listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14; *see also Bennett v. Spear*, 520 U.S. 154, 158 (1997). Consultation with the Service can be either formal or informal depending on the likelihood of the action to adversely affect listed species or critical habitat. 50 C.F.R. §§ 402.13, 402.14. Once a formal consultation is initiated, the Service will issue a Biological Opinion (either a "no jeopardy" or a "jeopardy" opinion) indicating whether the proposed agency action will jeopardize the continued existence of a listed species or result in the destruction or modification of its critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g). Importantly, a permit will not be issued for a project with a "jeopardy" opinion unless it is redesigned to lessen impacts; needless to say, "biological opinions under Section 7 have the power to stop development projects in their tracks and have sometimes done so." Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 141 (2004); *see, e.g., Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (ruling that the almost-constructed Tellico Dam, the completion of which (it was thought[4]) would

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[4] Subsequent to the Court's decision, "several small relict populations" of snail darter were discovered in other streams. *See* Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 Envtl. L. 1, 8 n.22 (2002). In 1984, the Service downlisted the fish to threatened status and rescinded its critical habitat. *See* 49 Fed. Reg. 27,510 (July 5, 1984).

eradicate the endangered snail darter (a small freshwater fish), could not proceed).

If landowners hardly ever needed federal authorization or funding for projects proposed on their properties, critical habitat designations might be considered relatively inconsequential from a legal and economic standpoint. But that is not the case. Increasingly, landowners have witnessed ever-greater involvement by federal agencies in land use and development. "As federal regulatory programs have expanded, an increasing number of non-federal activities require some sort of federal permit or approval, or some other federal nexus that triggers Section 7(a)(2) and the duty to avoid the adverse modification of critical habitat." Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 34 UCLA J. Envtl. L. & Pol'y 1, 6 (2016).

Nowhere has the expansion of federal regulatory programs been more pronounced than in the area of federal permitting of projects under the Clean Water Act. As one commentator has noted, "[t]he most likely source of a federal nexus for a private development project is Section 404 of the Clean Water Act, which requires private parties to obtain permits from the Army Corps of Engineers before conducting dredging or filling activities in the "waters of the United States," including wetlands, rivers, creeks, and streams. Sinden, *supra*, at 177 n.216 (citing 33 U.S.C. § 1344; 33 C.F.R. § 328.3(a)). But, as this Court is well aware, "[t]he reach of the Clean Water Act is notoriously unclear." *Sackett v.*

Environmental Protection Agency, 566 U.S. 120, 132 (2012). Faced with that statutory ambiguity, the federal agencies charged with the Act's implementation and enforcement—the Army Corps of Engineers and the Environmental Protection Agency—have pushed their federal permit jurisdiction to the limit (and, arguably, beyond). Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, 2012 Cato Sup. Ct. Rev. 139, 142-49 (2012) (tracing the expansion of federal regulatory jurisdiction under the Clean Water Act over the last four decades).

The upshot is that landowners risk having the federal government control the extent to which they can use and develop their properties. Federal regulatory programs, like the Clean Water Act, are expanding. And if the Fifth Circuit's decision stands, federal "critical habitat" designations will proliferate across the country—if not on the Service's own initiative, then certainly with the prodding of third-party environmentalist lawsuits demanding prophylactic designations of hypothetical habitat as a means of undermining productive use of property.

The market recognizes the cost of that risk as early as the proposal stage. According to a study funded by the Service itself, when the Service proposes to designate undeveloped land as critical habitat by publishing its property map, the price per acre of that land decreases by an average of 20 percent. *See* Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. Reg'l Sci. 67, 73 (2006)

(noting this particular finding had a *p* value of only 0.091). That same study found that the supply of single-family residential housing permits decreases markedly when critical habitat is proposed—by 23.5 percent in the short run and 37.0 percent in the long run. *See id.* at 93.

"The results indicate the proposal of [critical habitat] acts as a signal that all development in the [municipality] will be more costly." *Id.* at 68. The results are "consistent with anecdotal evidence that cities where [critical habitat] has been designated tend to become more risk averse and hence more stringent in issuing new building permits *regardless of whether or not they are for land in [critical habitat]-designated areas.*" *Id.* at 94 (emphasis added). The study focused on residential construction permits, but there is little reason to believe the effects are limited to that particular land use. And even the Service recognizes that critical habitat designations have significant ramifications on property valuation; its own economic analysis determined the Louisiana landowners burdened in this case will lose up to $34 million in development opportunities if the designation remains in place. 77 Fed. Reg. 35118, 35141.

Finally, upholding the Service's power to designate non-habitat will harm the average consumer of the goods and services that are the product of land uses: housing, commercial space, locally produced food, and other basic goods and services that are made possible only through the productive use of land. *See, e.g.*, Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of*

Critical Habitat Designation: A Comment on Critical Habitat and the Challenge of Regulating Small Harms, 43 Envtl. L. Rep. News & Analysis 10678, 10678 (2013) ("The designation of critical habitat under the Endangered Species Act (ESA) can result in significant and costly consequences for landowners, industry, government, and other entities—often with little if any evidence of a commensurate benefit to the species involved.").

Consider California's housing crisis. Working people are homeless. *See* Kateri Wozny, *Hope for California's Housing Crisis?*, U.S. News and World Report (April 3, 2018), https://www.usnews.com/news/best-states/articles/2018-04-03/is-there-hope-for-californias-housing-crisis. Multiple generations of a family share a single house. Unluckier families must share beds, garages, and even cars as their sleeping quarters. *See* Bryan Schatz, *California's Housing Crisis Is So Bad, Families Are Squatting Abandoned Homes Just to Survive*, Mother Jones (Mar./Apr. 2018), https://www.motherjones.com/crime-justice/2018/04/retake-the-house/. State and local politicians are working frantically to address the housing shortage in California. *See, generally*, California State Senate Majority Caucus, *Confronting California's Housing Crisis* (2018), http://focus.senate.ca.gov/housing#. Californians—companies and citizens alike—are leaving the state. *See* Conor Dougherty, *California Housing Problems Are Spilling Across Its Borders*, N.Y. Times, Mar. 20, 2018, at B1. The Service's ability to designate *actual* habitat already has taken land out of productive use, including for home-building purposes. Imagine how the power to designate

hypothetical habitat on land that is uninhabitable by any protected species will undermine efforts in California to provide housing to its residents. The harm to the average individual and family in desperate need of affordable housing in California and other states cannot be overstated.

II. HABITAT DESIGNATIONS AFFECT EVEN PROJECTS THAT DO NOT REQUIRE FEDERAL ACTION

In addition to the economic cost burdens described above, a "critical habitat" designation can impose regulatory burdens on a landowner even when a project requires no federal action. Specifically, land that has been designated as "critical habitat" can be used by state and local governments to justify significant limits on a property's use and development. For although ***federal law*** may not compel state and local governments to engage in Section 7 consultation with the Service or mandate project modification based on the existence of federally designated critical habitat, ***state and local laws*** can and do render such critical habitat relevant to (and often decisive in) the decision whether or the extent to which to allow a particular use.

The Service is well aware of the significant influence that its critical habitat designations have on state and local permit decision-making. That influence will only grow if the Service's designation power is expanded to the extent sanctioned by the Fifth Circuit in this case. *See, e.g.*, Dashiell Farewell, *Revitalizing Critical Habitat: The Ninth Circuit's Pro-Efficiency Approach*, 46 Envtl. L. 653, 663 (2016)

("With more parties on notice the more likely it is that habitat will receive the consideration and protection it deserves. . . . [A]gencies involved in restoration and conservation efforts will be more aware of areas worth their attention.").

We know the Service is aware of the effect of designation on local decision-making because the Service has recognized it in the past. California—one of the jurisdictions where state and local agencies regularly rely upon federally designated critical habitat to limit land use and development, even where there is no federal nexus—provides a number of examples.

In 2011, the Service proposed a rule designating critical habitat for the Sonoma County Distinct Population Segment of the California Tiger Salamander. Revised Proposed Rule for the Designation of Critical Habitat for the Sonoma County Distinct Population Segment of the California Tiger Salamander, 76 Fed. Reg. 2863 (Jan. 18, 2011). In analyzing the proposed rule's effect on small businesses, the Service recognized that, "even in the absence of a Federal nexus, indirect incremental impacts [on small businesses] may result if, for example, a city requests project modifications via the city's review under the California Environmental Quality Act (CEQA), due to the designation of critical habitat."[5] *Id.* at 2869.

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[5] CEQA is the California statute that requires state and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts if feasible. *See* Cal. Pub. Res. Code § 21000 *et seq.*

Indeed, the report produced "to assist the Secretary of the Interior in determining whether the benefits of excluding particular areas from the designation outweigh the biological benefits of including them" found the designation was likely "to impose losses of over $336 million relating to lost development opportunities." *See* CRA International, *Economic Effects of Critical Habitat Designation for the California Tiger Salamander in Sonoma County* 1, 3 (Sept. 23, 2005). Those effects were expected to be concentrated in the real estate development sector, particularly where there are few alternative sites for development or housing is highly rationed. The report recognized that "[t]he welfare impacts of critical habitat designations are affected by the nature and extent of prior interventions such as zoning, urban growth boundaries and other policies." *See id.* at 23; *see also id.* at 25-26 (discussing the intersection between Clean Water Act requirements and the Santa Rosa Plain Conservation Strategy).

Another example comes from the California Coastal Commission, the state agency responsible for regulating and permitting land use and development along the California coast. *See* Cal. Pub. Res. Code § 30001.5; *Ross v. Cal. Coastal Comm'n*, 199 Cal. App. 4th 900, 923 (2011) (referring to the agency's governing statute, the Coastal Act, as "a comprehensive scheme to govern coastal land use planning for the entire state"). One of the Coastal Commission's strongest weapons against land use and development is the Coastal Act's concept of an "Environmentally Sensitive Habitat Area" ("ESHA"), which is defined as:

> any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Cal. Pub. Res. Code § 30107.5.

Designation of property as "ESHA" is the death knell of almost any use or development of private property. That is because only so-called "resource-dependent uses" of property are allowed in an ESHA. *See id.* § 30240(a) ("Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.").

How precisely does the Coastal Commission go about deciding whether an area of land is an ESHA? It turns out that the California Coastal Commission assumes property is ESHA—and is therefore undevelopable—if it is or ever has been federally designated as critical habitat. For instance, when the Coastal Commission was reviewing a proposed development of a toll road in Southern California in what was then mostly undeveloped open space, it observed that some of that area was federally designated critical habitat. That was enough to declare the area an undevelopable ESHA and, partly on that basis, the Commission denied the project:

> [A]lthough the Commission is not limited to designated critical habitats

> when defining ESHA, the Commission can rely on critical habitat designations as one of the components supporting an ESHA determination.
>
> As detailed below, the Commission finds that those areas within the coastal zone portion of the proposed project area that are currently or have previously been specifically designated as critical habitat by the U.S. Fish and Wildlife Service (FWS) due to the recognized and established presence of federally listed threatened or endangered species and/or the importance of these areas to the conservation of threatened or endangered species also qualify as environmentally sensitive habitat areas, ESHA.

California Coastal Commission, Revised Staff Report and Recommendation on Consistency Certification, for Consistency Certification No. CC018-07 29 (Feb. 6, 2008) https://documents.coastal.ca.gov/reports/2008/2/W8b-2-2008.pdf.

In sum, the effect of a "critical habitat" designation is not limited to projects requiring federal action. The designation can also influence and, in some cases, influence the permit decisions of state and local agencies, to the detriment of developers, ranchers, business owners, foresters, and other property owners. The power to designate even non-habitat as "critical habitat" is the power to further

threaten and erode their ability to use their properties.

III. STATES, LOCAL GOVERNMENTS, AND THE PRIVATE SECTOR ARE PLAYING AN EVER-GROWING ROLE IN SPECIES CONSERVATION, MAKING IT UNNECESSARY—AND UNWISE—TO EXPAND THE SERVICE'S DESIGNATION POWER TO INCLUDE NON-HABITAT WITH NO NEXUS TO A LISTED SPECIES

The federal government's constitutionally limited role in species conservation does not leave endangered and threatened species unprotected. States are actually quite good at regulating land use in an effort to protect such species, including on private property. California has some of the most burdensome and extensive environmental regulations in the country. "The primary benefit for enhanced state responsibility in species conservation derives from sheer institutional presence and strength on the land where conservation action is needed." Kaush Arha and Barton H. "Buzz" Thompson, *Endangered Species Act and Federalism: Effective Species Conservation through Greater State Commitment* 9 (Woods Inst. for Environment, Stanford L. Sch. Policy Paper) https://woods.stanford.edu/sites/default/files/files/Endangered-Species-Act-Policy-Paper-20050224.pdf.

A chart of 2005 resources devoted to wildlife conservation in California demonstrates the State's presence and strength in that space:

	CA Fish & Game Dept.	USFWS	NOAA Fisheries
# of Game Wardens / Law Enf. Agents	350	20	14
# of Biologists*	886	168**	52
Total Wardens & Biologists	1,236	188	66
Total Budget for FY 2004	283,158,000	32,500,000***	29,920,000

* does not include state or federal biologists stationed at state or federal wildlife refuges or fish hatcheries as there job entails managing that parcel of land rather than working with entities outside the confines of the hatchery or wildlife refuge.
** the number refers to FWS biologists in both California & Nevada.
*** represents only the appropriated funds to Sacramento Office of FWS.

Id. at 11-12.

Indeed, "[g]iven the familiarity of state institutions with the ecological, economic, and social landscape of the state they are better positioned than the transient representatives of the federal government to design and implement species

conservation programs with better effect and at less cost." *Id.* at 12. That is not to say states are perfect. *See* Alejandro E. Camacho, Michael Robinson-Dorn, Asena Cansu Yildiz, and Tara Teegarden, *Assessing State Laws and Resources for Endangered Species Protection*, 47 Envtl. L. Rep. 10838 (Oct. 2017). But states like California—and regional bodies like the Western Governors' Association—can and do put significant resources toward species conservation. *See* Western Governors' Association, *Species Conservation and Endangered Species Act Initiative*, http://westgov.org/initiatives/species-conservation-and-esa. "[T]o reach the full potential of our species conservation efforts states agencies need to take the lead, as they did in game management, buttressed by federals laws and resources." Arha and Thompson at 15; *see also* John Copeland Nagle, *The Original Role of the States in the Endangered Species Act*, 53 Idaho L. Rev. 385, 388 (2017) ("The Congress that enacted the ESA in 1973 expected that states would play a lead in conservation efforts because the states already had substantially more wildlife management expertise than the federal government. The federal role, as the Department of the Interior testified at the time, was 'an overseeing operation' to ensure that states were fulfilling the purposes of the law.").

The private sector has in recent years begun playing an ever greater role in species conservation as well. The American Prairie Reserve, for example, combines "existing public lands with private resources and a businesslike approach to securing land." Pete Geddes, *The Yellowstone of the Future*, N.Y. Times, Dec. 28, 2015, at A19. The organization has raised "$100 million from private supporters to purchase 25

properties, which are now open to the public for camping, hiking, and hunting." Huggins, *supra*. American Prairie Reserve has reintroduced bison, converted existing fences to more migration-friendly boundaries, and incentivized neighboring farmers and ranchers to permit wandering wildlife to find a meal on their land.

The arc of environmental conservation in many states, like California, is bending toward greater state, local, and voluntary protection of threatened and endangered species. Affirming the Fifth Circuit and blessing the Service's unfettered ability to designate private land as critical habitat when that land is neither habitat nor critical threaten to undermine that trend and institute greater top-down controls that serve neither the States, its businesses and consumers, nor the resource-strapped federal Service.

CONCLUSION

For the reasons stated above, and those stated in the briefs of Petitioner and of Respondents Markle Interests, LLC, *et al.*, Amici urge the Court to reverse the Fifth Circuit's decision.

DATED: April 2018

Respectfully submitted,

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No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER CO.,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET. AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CATO INSTITUTE AND NEW ENGLAND LEGAL FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The petition presents two questions for review:

1. Can 1,500 acres of private land that isn't used or occupied by a species really be considered "critical habitat" that is "essential to the conservation" of that species under the Endangered Species Act?

2. If so, what part of the Constitution authorizes that sort of thing?

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, conducts conferences, files briefs, and publishes books, studies, and the annual *Cato Supreme Court Review*.

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This case concerns *amici* because it implicates the ability of government to burden private citizens' property rights through actions that violate the Constitution. If the decision below stands, "vast portions of the United States could be designated as 'critical habitat' because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 481 (2016) (Owen, J., dissenting).

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[1] Rule 37 statement: All parties filed blanket consents. No party's counsel authored this brief in any part and nobody but *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers created a system of government that would protect the people by limiting the power of government through structural design. As Madison put it: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people." The Federalist No. 51 (Madison).

The U.S. Fish and Wildlife Service (FWS) disregarded both of these liberty-protecting structural safeguards when it designated petitioner's property (Unit 1) as "critical habitat" of the "dusky gopher frog." While Congress delegated the FWS power to designate critical habitat in the Endangered Species Act (ESA), that power is not unlimited. The ESA defines the criteria by which the FWS may designate property as critical habitat of a listed species. This includes property that is both occupied and unoccupied, but the ESA's plain meaning still requires the property to be the species' *habitat*. Unit 1 is by no means the frog's habitat and thus cannot be its "critical habitat."

The FWS's interpretation of habit that is "essential to the conservation" of a species is unmoored from all bounds of reason. The agency has rewritten the ESA to enlarge its power to reach property Congress never gave it power to reach. This aggrandizement of the FWS's power—and the precedent it sets for land regulation—will have major economic and political consequences. The Constitution does not let executive agencies amend statutes in this way.

Further, if the FWS's expansive definition of "critical habitat" is deemed a valid exercise of administrative discretion, then that expansive statutory reading goes beyond the strictures of the Commerce and Necessary and Proper Clauses. Allowing federal agencies to take jurisdiction over essentially any piece of land pursuant to the ESA would be an improper expansion of federal power into unrestrained land-use regulation, a traditional state activity. The Commerce Clause currently supports the comprehensive ESA scheme—and critical-habitat designation can be reasonably connected to that scheme as a necessary and proper means of effectuating it. But how far can that go? Can we link one power to another in an endless "house that Jack built" until there's federal regulation of land that is *not* critical habitat? *United States v. Comstock*, 560 U.S. 126, 150 (2010) (Kennedy, J., concurring). No: the regulation here is neither necessary nor proper. It's not necessary because Unit 1 doesn't play any role in the frog's conservation, and it's not proper because it infringes on state land-use regulation.

The mere existence of land does not constitute "economic activity" under the Commerce Clause. Otherwise, Congress would have jurisdiction over all land in the country *qua* land, regulating the states in the same way it regulates federal enclaves. Instead, it's the activities that take place on the land, such as Roscoe Filburn's farming, that determine whether Congress can regulate. *Wickard v. Filburn*, 317 U.S. 111 (1942). The proper analogy here would be to the question whether Congress could regulate land that Mr. Filburn wasn't farming and couldn't farm—a non-habitat for wheat, if you will—pursuant to a comprehensive scheme of ag-

ricultural regulation. Such a regulation of "Mr. Filburn's Impossible Farm" would be both unnecessary and improper, just as the regulation of Unit 1 is here.

In sum, the courts below sanctioned a rewriting of the ESA when it granted *Chevron* deference to the FWS. This Court should reaffirm that the federal government cannot disregard the Constitution's structural limits and accordingly reverse the ruling below.

ARGUMENT

I. THE COURTS BELOW SHOULD NOT HAVE DEFERRED TO THE GOVERNMENT'S INTERPRETATION OF THE ESA

The "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist, No. 47 (Madison). To protect against this accumulation of power, the Constitution vests distinct powers in three separate branches, *see Dep't of Transp. v. Ass'n. of Am. R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment), and each branch has "the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist, No. 51 (Madison). This Court has repeatedly confirmed these basic maxims. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

Yet administrative agencies like the FWS regularly evade many of these constitutional checks and wield vast power "over our economic, social, and political activities." *City of Arlington v. FCC*, 569 U.S. 290, 313

(2013) (Roberts, C.J., dissenting) (citations omitted). Many observers, including members of this Court, believe that *Chevron* deference plays a major part in this breakdown in constitutional design. *See e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("Interpreting federal statutes—including ambiguous ones administered by an agency—calls for . . . exercise of independent judgment. *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is the best reading of an ambiguous statute in favor of an agency's construction.") (internal quotation marks and citation omitted); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that judicial deference doctrines "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design").

Neither petitioners nor *amici* ask the Court to overturn *Chevron* here. By ignoring key parts of the ESA in regulating Unit 1 as the gopher frog's "essential" critical habitat, however, the FWS stretched an already overextended *Chevron* deference past its limits. The lower courts then abdicated their responsibility to enforce the limits of deference, demonstrating how deference to agencies frustrates the separation of powers.

A. The FWS Interpretation of "Essential" Is Unreasonable

While the Court has allowed Congress wide latitude in delegating its authority to executive agencies, it is also axiomatic that, for *Chevron* deference to apply, a court must first review an agency's construction

of the statute to determine whether Congress has directly spoken to the precise question at issue. Because, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984). Otherwise, administrative agencies would be unconstitutionally making law.

The reviewing court must use "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, to determine whether a statute is ambiguous. This Court has repeatedly held that "in all statutory construction, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (cleaned up); *see also Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (noting that applying the plain-meaning rule is a "fundamental canon of statutory construction"). Moreover, the ordinary meaning of a statute is found not only through its words, but also through the context in which those words are used within the statutory framework. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[O]ftentimes the meaning . . . of certain words or phrases may only become evident when placed in context . . . [so] we must read the words in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks and citations omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole.").

Both the district court and panel majority below ignored the context in which the ESA defines "critical habitat." The ESA defines critical *habitat* in two ways:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) *essential to the conservation of the species* and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are *essential for the conservation of the species.*

16 U.S.C. § 1532(5)(A)(i)–(ii) (emphasis added). While both definitions are distinct in that both identify different subsets of land—occupied and unoccupied—they have something very important in common: both require the designated property to be *habitat* of the species. It is then, and only then, that habitat can become critical. *See* Pet. for Writ of Cert., *Markle Interests v. U.St. Fish & Wildlife Serv.* at 18-24 (2017) (No. 17-74); *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F. 3d 635, 639-652 (5th Cir. 2017) (en banc) (Jones, J., dissental). By reading out of the statute this "habitability requirement"—one of the key limiting features of the ESA—the courts below have turned this provision into little more than a blank slate for the FWS to fill in its jurisdiction.

If the panel majority and district court below would have adhered to these foundational principles of statutory construction, this case could have been easily disposed of by simply interpreting the text, context,

and structure of the ESA. But both courts below focused on a narrow provision of the ESA to find ambiguity—and, in the process, sanctioned a definition of "essential" that went beyond any bounds of reason.

Chevron mandates that courts accept an agency's reasonable construction of an ambiguity in a statute that the agency is responsible for administering. 467 U.S. at 842–43 . But "[e]ven under this deferential standard . . . agencies must operate within the bounds of reasonable interpretation." *Michigan*, 135 S. Ct. at 2707 (internal quotation marks and citation omitted).

The government argues—and both courts below accepted—that the term "essential" in the ESA gives it authority to regulate private land that is neither occupied by the frog nor contains all the essential features necessary for the species to occupy the land. *See* Pet. Writ of Certiorari, *Markle Interests v. U.S. Fish & Wildlife Serv.* at 23 (2017) (No. 17-74). But how can something with no connection to a species' conservation be "essential"? As the en banc and panel dissents point out, this is simply an implausible reading of the statutory text—and any definition of the word "essential." *See Markle*, 848 F. 3d, at 646–52 (Jones, J., dissental); *see also, Markle* 827 F. 3d at 484 (Owen, J., dissenting) (noting that the FWS's interpretation of "essential" "goes beyond the boundaries of what 'essential' can reasonable be interpreted to mean.").

If the FWS is free to define private land as "essential" for species conservation when that land is "not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance . . . and does not play any supporting role in the existence

of current habitat for the species," there is no meaningful limit on FWS jurisdiction under the ESA. *See Markle*, 827 F.3d at 481 (Owen, J., dissenting).

B. When a Statutory Construction Has Major Political and Economic Consequences, the Court Requires a Clear Statement from Congress before It Will Apply *Chevron*

This case could and should have been resolved by simply applying the text of the ESA to strike down the FWS regulation of Unit 1. *Chevron* deference should have never applied because the statute's plain meaning is clear, and the FWS interpretation of "essential" is unreasonable. But there is another fundamental reason this Court should overrule the lower court's application of *Chevron*: if the ESA allows the FWS to define private land that has—at best—hypothetical *de minimis* connection to the species as "essential," Congress would have made that clear.

When determining whether to apply *Chevron* deference to agency interpretations of statutes, this Court has withheld deference where the agency is regulating beyond mere "interstitial matters" without clear congressional approval. In these situations, non-delegation is presumed because Congress is "more likely to have focused upon, and answered, major questions." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986); *see also*, William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 288 (2016) ("[The] Supreme Court has carved out a potentially important exception to delegation, the major questions cannon. Even if Congress has delegated an agency general rulemaking or adjudicatory power,

judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions.").

Several of this Court's precedents have confirmed this "major questions" doctrine over the past 25 years:

- *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (withholding deference where it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.").
- *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (withholding deference where the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").
- *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (withholding deference because "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act]'s registration provision is not sustainable").
- *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("When an agency claims to discover in a long extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. [The Court] expect[s] Congress to speak clearly if it wishes to assign to an agency decision of vast economic and political significance.") (internal quotations and citations omitted).

- *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (withholding deference and holding that where the issue was "a question of deep economic and political significance[,] . . . had Congress wished to assign that question to an agency, it surely would have done so expressly.").

While there has been no set standard for when this "major questions" principle applies, from these cases a broad theme has emerged for determining when deference to an agency interpretation is inappropriate. Thus, where a regulation implicates questions of "vast economic or political significance," or where an agency relies on novel interpretations of long standing statutory provisions to justify a transformative expansion of its regulatory authority, and Congress has not clearly spoken, deference should be withheld. This case is the poster-child for applying this doctrine.

The ESA requires the FWS to conduct a cost-benefit analysis and "take into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). During the FWS analysis of Unit 1, it considered "lost economic efficiency associated with residential and commercial development and public projects and activities." 77 Fed. Reg. 35118 (June 12, 2012). After concluding its analysis, the government recognized the Unit 1 landowners "have invested a significant amount of time and dollars into their plans to develop this area." Indus. Econ., Inc., *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, http://bit.ly/2hPhQrF (last visited August 1, 2017); *see* Pet. for Writ of Cert., *Markle* at 11-12 (No. 17-74). This regulation alone, the FWS found, could cost the Unit 1 landowners $33.9 million over 20 years. *See id.* at 13.

If the regulation of one small area in Louisiana could have an economic impact of $33.9 million on one set of landowners, one can only imagine how many billions of dollars this expansive view of critical habitat could cost landowners nationwide. Indeed, if the FWS definition of "essential" stands—that private land needs to contain only a single instance of a multitude of possible "primary constituent elements" (PCEs)—then vast portions of the country's private land will be subject to prohibitive devaluation. *See id.* at 33; *see also, Markle*, 848 F. 3d at 651 (en banc) (Jones, J., dissental) (noting that the panel majority's decision gives the government "virtually limitless" power to regulate private land as critical habitat); *Markle*, 827 F.3d at 483 (Owen, J., dissenting) ("The Government's, and the majority opinion's, interpretation of 'essential' means that virtually any part of the United States could be designated as "critical habitat."). This is because, as the Fifth Circuit en banc dissent points out, there is an extensive list of PCEs that could potentially subject private land—which traditionally is regulated by state governments—to federal regulation.

These potential PCEs include, but are not limited to: "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and "natural light regime[s] within the coastal dune ecosystem." *Markle*, 848 F. 3d at 651 (en banc) (Jones, J., dissental). Further, if the FWS is allowed to use only one of these PCEs to designate private land, "there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 652. Under the FWS interpretation of the ESA, "the Service has the authority to designate as critical habitat any land unoccupied

by and incapable of being occupied by a species simply because it contains one of those features." *Id.* At bottom, this aggrandizing interpretation "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id.* This is not some alarmist parade of horribles. Indeed, the government, after the Fifth Circuit ruling, codified this single PCE standard into a generally applicable rule to list land as critical habitat. *See Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat*, 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016); *see also* Pet. for Writ of Cert., *Markle* at 35-36 (No. 17-74).

This unprecedented power grab allows the federal government to expand its jurisdiction to regulate private land by interpreting a single word—"essential"—in a statute that has been on the books for over 40 years. Has this power just lain dormant all that time? If so, it is truly an "elephant" hiding in a "mousehole." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also Solid Waste Agency of N. Cook Cty. ("SWANCC") v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

Whether the FWS ignores or reinterprets key ESA terms to reach non-covered property, what it's really doing is creating an expansive law that Congress never passed. By sanctioning this aggrandizement of power in a 40-year-old statute, the courts below have allowed the executive branch to effectively rewrite the ESA. This will have major adverse economic and political consequences for property owners in this country.

II. THE CONSTITUTION PERMITS NEITHER CONGRESS NOR AN EXECUTIVE AGENCY TO REGULATE EITHER "MR. FILBURN'S IMPOSSIBLE FARM" OR UNIT 1

As mentioned *supra*, "Mr. Filburn's Impossible Farm" is a hypothetical piece of land that Roscoe Filburn (of *Wickard v. Filburn* fame) doesn't—and can't—farm. Similarly, Unit 1 is a piece of "critical habitat" that the dusky gopher frog doesn't live on and that "cannot sustain the species without modification." *See* Pet. for Writ of Cert., *Markle* at 23 (No. 17-74). Both pieces of land are outside Congress's jurisdiction under the Commerce and Necessary and Proper Clauses.

The FWS interpretation of the ESA doesn't just stretch *Chevron* to the breaking point, it oversteps constitutional limits. An agency's interpretation of a statute passed pursuant to the Commerce and Necessary and Proper Clauses is of course cabined by those clauses' reach. Just as it would be improper to allow an agency to interpret the statutory phrase "essential to health care" so as to allow for a regulatory individual mandate, *Nat'l Fed'n of Indep. Bus. ("NFIB") v. Sebelius*, 567 U.S. 519, 559-61 (2012), it would be improper to allow the FWS to interpret "essential to the conservation of the species" as to allow the regulation of land that is not in fact habitat.

A. Unit 1 Isn't Habitat for the Frog, So It's Noncommercialeconomic under the ESA

The ESA regulates land and activities that are necessarily and properly connected to the central object of the statute: the species themselves. The ESA cannot constitutionally reach beyond those limits. Otherwise,

it would be a general land-use-regulation statute, unmoored from any constitutional foundations. Unit 1 is not habitat for the frog and so is beyond the ESA's regulatory reach under the Commerce and Necessary and Proper Clauses. For the same reasons that the Agricultural Adjustment Act of 1938 could not constitutionally reach Mr. Filburn's Impossible Farm, the ESA cannot reach Mr. Frog's Impossible Habitat.

The Constitution allows Congress to "regulate Commerce . . . among the states," as well as do those things "necessary and proper for carrying into Execution" the power to regulate commerce. U.S. Const. art. I, § 8. While this Court has broadly construed those powers, *see, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942), the clause has limits. This Court made that clear in *Lopez*. There, the Court outlined "three broad categories of activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). These categories include: 1) the regulation of the channels of interstate commerce; 2) the regulation of the instrumentalities of, objects in, and persons engaged in interstate commerce; and 3) the regulation of activities that have substantial effects on interstate commerce. *Id.* Focusing on prong three, the *Lopez* majority struck down a federal statutory provision banning the mere possession of a gun in a school zone, holding that the "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567; *see also United States v. Morrison*, 529 U.S. 598, 613 (2000) (overturning the Violence Against Women Act because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."). Thus, the connection between the regulated intrastate

"activity" and interstate commerce must be "economic." *See id*; *see also NFIB*, 567 U.S. at 550 (2012) ("The power to regulate commerce presupposes the existence of commercial activity to be regulated.").

A piece of land's mere existence does not constitute "economic activity" under the Commerce Clause. Otherwise, the Constitution would allow comprehensive land-use regulation without any connection to interstate commerce. As the Court said—or at least strongly implied—in *SWANCC*, 531 U.S. 159, merely using property, with little connection to interstate commerce, is not regulable economic activity under the Commerce Clause. In that case, similar to what the FWS has done here, the U.S. Army Corps of Engineers claimed jurisdiction over non-federal property (an abandoned gravel and sand pit with permanent and seasonal ponds) as a "water of the United States" due to the presence of migratory birds. In avoiding the constitutional question, this Court operated under the "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority" by allowing the Corps to claim "jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id.* at 172-73, 173; Pet. Brief at 37. The Court was concerned that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

The FWS claim of jurisdiction over Unit 1 is similarly expansive in that it seeks jurisdiction over something that is not economic activity. Even if land-use

alone could be considered economic activity, it would not have a substantial effect on interstate commerce because that commerce—the frog, the original object of regulation—has no connection to Unit 1: the land is "not near areas inhabited by the species; cannot sustain the species...and does not play any supporting role in the existence of the current habitat for the species." *Markle*, 827 F.3d at 481 (Owen, J., dissenting).

Apparently recognizing this flaw in the FWS jurisdictional claim, the court below relied on the comprehensive-scheme approach to uphold the regulation of Unit 1. *See Markle*, 827 F.3d at 476–78. But the comprehensive-scheme test has never been used to regulate *non*economic, *non*commercial activity that might have an effect on interstate commerce such as land use in general. *See, e.g.*, *NFIB*, 567 U.S. at 548–61 (holding that the comprehensive Affordable Care Act did not authorize the individual insurance mandate as a regulation of noneconomic, noncommercial activity under the commerce power). If the government has that power, the Necessary and Proper Clause is the only constitutional provision that allows it—but neither of the courts below addressed that clause in any detail.

B. The Regulation of Unit 1 Is Neither Necessary Nor Proper

Under the Constitution, Congress can "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers. Art. I, § 8, cl. 18. Although "this power gives Congress authority to legislate on that vast mass of incidental powers which must be involved in the constitution, it does not license the exercise of any great substantive and independent power[s] beyond those specifically enumerated." *NFIB*, 567 U.S. at 559 (cleaned up). Instead, it is "merely a

declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant." *Id.*

As this Court noted in *NFIB*, its jurisprudence under this clause has been "very deferential to Congress's determination that a regulation is 'necessary,'" but it has also "carried out [its] responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution." *Id.* "Such laws," moreover, "which are not consist[ent] with the letter and spirit of the constitution, are not proper [means] for carrying into execution Congress's enumerated powers." *Id.* And when these laws are not in that spirit, the Court noted, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Id.* (citing *Printz v. United States*, 521 U.S. 898, 924 (1997) (quoting The Federalist No. 33 (Hamilton)).

1. The Regulation Is Not Necessary

In *McCulloch*, the first case to address the meaning of the Necessary and Proper Clause, Chief Justice John Marshall's opinion outlined a broad definition of necessity that later courts would take to mean "convenient, or useful." *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819). In responding to critics of his opinion, however, Marshall denied that this was the case: "The court does not say that the word 'necessary' means whatever may be 'convenient' or 'useful.' And when it uses 'conducive to,' that word is associated with others plainly showing that no remote, no distant conduciveness to the object, is in the mind of the court." John Marshall, A Friend to the Union No. 2, in John Marshall's Defense of *McCulloch v. Maryland* 78, 100 (Ger-

ald Gunther ed., 1969). Nevertheless, the broad, deferential interpretation of "necessary" has held its ground. *See NFIB*, 567 U.S. at 558-60.

But members of this Court have questioned that construction of necessity. In his concurring opinion in *Comstock*, Justice Alito objected to the Court's abdication of its judicial duty to fully analyze what "necessity" consists of: "Although the term 'necessary' does not mean 'absolutely necessary' or indispensable, the term requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress. . . . And it is an obligation of this Court to enforce compliance with that limitation.'" *Comstock*, 560 U.S. at 158 (2010) (Alito, J. concurring) (quoting *McCulloch*, 17 U.S. at 415); *see also*, *id* at 152 (Kennedy, J. concurring) (concluding that the necessary prong of the Necessary and Proper analysis "can be put into a verbal formulation that fits somewhere along a causal chain of federal powers . . . the Constitution does require the invalidation of congressional attempts to extend federal powers in some instances.").

Nevertheless, even if the test gives great deference to Congress's power, this case does not pass muster. Indeed, there is absolutely no need to regulate Unit 1 to advance the goals of the ESA or to conserve any of the species it protects, much less a necessary one. It would not be "useful" or "convenient" to regulate Unit 1, because it plays "no part in the conservation" of the dusky gopher frog. *See Markle*, 827 F.3d at 480 (Owen, J., dissenting). Moreover, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id*; *see also*, *Markle*, 848 F. 3d at 636-37 (en banc) (Jones, J., dissental) ("The panel opinion . . . approved an unauthorized extension of ESA restrictions to 1,500 acre-plus Louisiana land

tract that is neither occupied by nor suitable for occupation by nor connected in any way to the [dusky gopher frog]."). Thus, for the same reason that the FWS statutory interpretation of "essential" is problematic—as applied to Unit 1, or any other land with attenuated connection to a species—the idea that it is necessary to regulate Unit 1 to protect the frog is equally so.

2. The Designation of Unit 1 Is Not Proper

McCulloch also addressed the propriety prong of the Necessary and Proper Clause. The means used to carry out incidental powers "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *McCulloch*, 17 U.S. at 421. Thus, this analysis must consider whether the law—or in this case, the regulation—infringes on state sovereignty. *See Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., concurring) ("No law that flattens the principle of state sovereignty, whether or not 'necessary,' can be said to be 'proper.'"); *Comstock*, 560 U.S. at 155 (Kennedy, J., concurring) (noting "[n]or is [this] a case in which the exercise of national power intrudes upon functions and duties traditionally committed to the State" in upholding the law as proper.) (citing *Lopez*, 514 U.S. at 580-581); *Raich v. Gonzales*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) ("[A law is not] proper for carrying into Execution the Commerce Clause [w]hen [it] violates [a constitutional] principle of state sovereignty.") (internal quotation marks and citation omitted); *see also* Gary Lawson & Patricia Granger, *The "Proper Scope" of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 301- 08 (1993).

If this regulation stands, most if not all of this country's private land would be subject to federal regulation. The single PCE rule gives the federal government almost "limitless power" to "regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power." *See* Pet. of Writ of Cert., *Markle* at 33 (No. 17-74). That's because almost any land or water will contain at least one of the PCEs the FWS uses to evaluate critical habitat. Judge Owen's warning in dissent from the Fifth Circuit panel's majority opinion bears repeating:

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it.

Markle, 827 F.3d at 481 (Owen, J., dissenting).

Accordingly, if this Court affirms the lower court, then regulations will no doubt be forthcoming from the new, generally applicable federal power to impinge on the states' traditional police power to regulate land and water use. To say the least, that's not a proper means of carrying into execution the commerce power.

CONCLUSION

For the reasons set forth above, and those stated by the petitioner and respondents in support of petitioner, the Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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April 30, 2018

No. 17-71

In The Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CAUSE OF ACTION INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.*

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* *Amicus Curiae* Cause of Action Institute only addresses the second Question Presented in this brief.

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BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CoA Institute") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae CoA Institute is a 501(c)(3) nonpartisan, nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.[2] CoA Institute uses various investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, representing third-party plaintiffs in actions against the federal government and appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

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[1] In accordance with Supreme Court Rule 37.2(a), blanket consent has been granted by all parties. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute financially contributed to preparing this brief.

[2] *See* Cause of Action Inst., *About*, www.causeofaction.org/about (last visited Apr. 26, 2018).

CoA Institute has a particular interest in this matter, because the Fifth Circuit's determination that the United States Fish and Wildlife Service's ("FWS" or the "Service") failure to exclude an area of land from critical habitat designation under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, is discretionary and thus not subject to judicial review is contrary to existing law and precedent. As Judge Edith Jones articulated in her dissent from denial of rehearing *en banc*, the "ramifications" of the panel's decision "for judicial review of agency action cannot be underestimated." Pet. App. 126a. The panel's decision "play[s] havoc with administrative law." *Id.* at 156a (Jones, J., dissenting). This is because the determination is both contrary to existing law and precedent, but also because the consequences of denying judicial review are not limited to decisions made by the Service, but may be felt throughout the entire administrative state. An adverse ruling has the potential to deprive individuals and businesses affected by the regulatory powers of the administrative state of their right to challenge agency abuses of discretion.

SUMMARY OF THE ARGUMENT

The strong presumption in favor of judicial review of administrative actions was not overcome below. Stripping actions of such import as are found here of judicial review is inconsistent with precedent and the statutory scheme. Under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, there is a

"strong presumption" of the judicial reviewability of agency actions. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). The Court of Appeals for the Fifth Circuit's majority opinion did not overcome this presumption in its determination that the Service's decision not to exclude land from a critical habitat designation is not judicially reviewable.

In making its determination, the panel failed to adequately consider the language of 16 U.S.C. § 1533(b)(2) and the overall structure of the ESA, and erroneously relied on caselaw from the Ninth Circuit and several district courts that suffer from similar analytical impairments. The panel's decision that judicial review is precluded under 5 U.S.C. § 701(a)(2), is contradicted by this Court's emphasis on "careful examination of the statute on which the claim of agency illegality is based." *Webster v. Doe*, 486 U.S. 592, 600 (1988). The overall structure of the ESA and the specific language of 16 U.S.C. § 1533(b)(2) stand in stark contrast to the consistent holdings of this Court that the presumption of judicial review can only be overcome in narrow instances in which no standard is available to conduct such review. This is not that case. Thus, the FWS's decision not to exclude land from a critical habitat designation is judicially reviewable. *Cf. Bennett v. Spear*, 520 U.S. 154, 171-72 (1997).

STATEMENT OF THE CASE

The ESA generally requires that the Service, "determine whether any species is an endangered species or threatened species" due to certain natural or manmade factors. 16 U.S.C. § 1533(a)(1). The determination must be made "solely on the basis of the best scientific and commercial data available" and is subject to formal rulemaking processes. *See* 16 U.S.C. § 1533(b)(1)(A); § 1533(a)(1). Upon making such a determination, the Service shall "to the maximum extent prudent and determinable . . . designate any habitat of [an endangered or threatened species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). "Critical habitat" may be either occupied habitat or unoccupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i)-(ii). Unoccupied habitat is those "specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533" of the ESA. 16 U.S.C. § 1532(5)(A)(ii). Unoccupied areas may only be designated as critical habitat if "such areas are essential for the conservation of the species." *Ibid.*

The ESA requires that

> [t]he Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area

> from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

In 2001, the FWS listed the dusky gopher frog, *Rana sevosa*, as an endangered species.[3] As required under the ESA, the Service began the critical habitat designation process for the frog in 2010 and released a proposed rule, which identified areas in Mississippi as critical habitat for the frog. *See* 75 Fed. Reg. 31387, 31395 (June 3, 2010). In 2011, the FWS published a Revised Proposed Rule, which identified additional areas for designation as critical habitat, including over 1,500 acres of private land in Louisiana ("Unit 1"). *See* 76 Fed. Reg. 59774, 59780 (Sept. 27, 2011).

In 2012, the FWS published a final rule designating over 6,400 acres in Mississippi and Louisiana as "critical habitat," which included Unit 1. *See* 77 Fed. Reg. 35118 (June 12, 2012); JA100. Unit 1 is owned by several private property owners (collectively "Landowners" or "Petitioners"). *See* Pet. App. 88a-89a. Throughout the designation process and to this day,

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[3] The dusky gopher frog was originally listed as the "Mississippi gopher frog" but its name was later changed by the Service during the time that the rule designating its critical habitat was being developed. *See* Pet. App. 111a-112a; JA101.

Unit 1 has functioned as a closed canopy commercial loblolly pine timber operation by Petitioner Weyerhaeuser. *See* Pet. Weyerhaeuser Brief at 2; *see also* Pet. App. 88a-89a.

As identified during the critical habitat designation process, the dusky gopher frog requires three basic environmental features, or "primary constituent elements" ("PCEs"), in its habitat to survive: (1) small, isolated, ephemeral ponds located in an open canopy forest for breeding; (2) upland, open canopy forests frequented by fires often enough to maintain the open canopy and sustain "herbaceous ground cover" for nonbreeding habitat; and (3) similar type upland habitat connecting "breeding and nonbreeding habitat." *See* 77 Fed. Reg. at 35131; JA153-JA154. Of these three PCEs, Unit 1 only partially meets the first requirement – the existence of isolated ephemeral ponds. *Id.* at 35123; JA121. Further, the dusky frog has not been seen in the area of Unit 1 since the 1960s. *Id.* at 35124; JA124. Not only is Unit 1 currently uninhabitable by the frog, but designating the land as critical habitat could result in up to $34 million of lost development opportunities for the Landowners, which the Service acknowledged in its own economic analysis. *Id.* at 35140; JA188. Despite these facts, the Service included Unit 1 in the critical habitat designation for the dusky gopher frog because it determined that, *inter alia*, critical habitat designation does not require the presence of the PCEs for survival on the designated land and the Service's "economic analysis did not identify any disproportionate costs that are likely to result

from the designation." *Id.* at 35141; JA190. The Service also stated that it "believe[d] that the benefits" of designating the Unit 1 as critical habitat was "best expressed in biological terms" rather than economic considerations. *Id.*; JA137. Despite these facts, FWS still declared Unit 1 as critical habitat for the dusky gopher frog, a place where no such frog exists or according to the Service could survive in its present state.

In 2013, the Landowners challenged the designation of Unit 1 as critical habitat for the dusky gopher frog. Despite the district court's recognition that the Service's determination "that the economic impacts on Unit 1 are not disproportionate" was "troubling," the district court granted summary judgement in favor of the Service, deferring to the FWS's determination to include Unit 1 in the critical habitat designation and finding itself "without power" to overturn the Service's decision. Pet. App. 101a, 113a-114a, 118a.

On appeal, a divided Fifth Circuit panel affirmed the district court. *Id.* 1a-77a. The panel decided that the Service's determination not to exclude Unit 1 on the basis of disproportionate economic impacts was not subject to judicial review once the FWS "fulfilled its statutory obligation to consider" those impacts because that determination was discretionary and there were no manageable standards for the court to apply. *Id.* at 32a-36a. In February 2017, the Fifth Circuit denied the Landowners' petition for rehearing *en banc*, by an 8-6 vote. *Id.* at 124a. Judge Jones, joined by five other dissenting judges, issued an opinion warning that the "ramifications" of the panel majority's decision

regarding judicial review of agency action "cannot be underestimated." *Id.* at 126a. In response to the panel's ruling that the Service's economic analysis was not subject to judicial review, Judge Jones noted that the panel failed to consider *Bennet v. Spear* and its "clear signal that the Service's decision is reviewable." *Id.* at 161a. As Judge Jones argued, "[t]he panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action." *Id.* at 162a.

ARGUMENT

I. The Service's decision not to exclude Unit 1 from a critical habitat designation is subject to judicial review

A. The Fifth Circuit failed to apply the "strong presumption" of judicial reviewability of agency actions

Amicus agrees with Petitioner that "instead of presuming reviewability, the court presumed *un*reviewability." Pet. Weyerhaeuser Brief at 48 (emphasis in original). The presumption of unreviewability adopted by the panel is in clear contradiction to this Court's "'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015).

The APA sets forth "comprehensive provisions for judicial review of 'agency actions'" in §§ 701-06. *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). The APA

entitles persons "adversely affected or aggrieved by agency action" to judicial review of "final agency action for which there is no other adequate remedy in a court." *See* 5 U.S.C. §§ 702, 704. Availability of judicial review of final agency action is limited in only two circumstances: (1) where reviewability is precluded by statute; *or* (2) the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The APA's standards and scope of review are set forth in § 706, which requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be," amongst other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

In *Mach Mining*, this Court recognized that there is a "'strong presumption' favoring judicial review of administrative action" because "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." 135 S. Ct. at 1651. This presumption is rebuttable. *See id.* As the Court articulated, the presumption favoring judicial review of administrative action "fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Id.* However, the "heavy burden" establishing "that Congress 'prohibit[ed] all judicial review' of the agency's compliance with a legislative mandate" is borne by the agency. *Id.* (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). *Amicus* agrees with Petitioner that this presumption is not defeated by the "permissive phrasing" of a statue because such phrasing only "indicates that Congress has given the

agency discretion" not barred judicial review outright. Pet. Weyerhaeuser Brief at 48.

The second exemption, where agency action is "committed to agency discretion by law" is "a narrow one." *Heckler*, 470 U.S. at 826, 838. *Heckler* affirmed that an agency decision not to enforce a statute is presumed to be immune from judicial review under § (a)(2), as traditionally committed to agency discretion. *See Heckler*, 470 U.S. at 830-31. Within its analysis of the reviewability of enforcement decisions, *Heckler* identified two key characteristics of an agency's decision not to act: the lack of exercise of the agency's "coercive power"; and the lack of "focus for judicial review" that the exercise of power would provide. *Id.* at 832 (citing *FTC v. Klesner*, 280 U.S. 19 (1929)). These characteristics, which are present when an agency does not act at all, cut the other way once an agency has acted to exercise its coercive power, thus providing a focus for judicial review.

Heckler also confirmed the analysis of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), that judicial review under § (a)(2) requires a meaningful standard against which to judge, and that, where such a standard exists, judicial review may be had – even in the special case of decisions not to enforce. *See Heckler*, 470 U.S. at 830-31, 835 ("If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701 (a)(2), and courts may require that the agency follow that law.").

While the § (a)(1) and § (a)(2) exceptions are distinct, as discussed *infra*, the strong presumption of reviewability of § (a)(1) is also applicable to § (a)(2) because "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining*, 135 S. Ct. at 1651; *see also Heckler*, 470 U.S. at 848 (Marshall, J., concurring in the judgment) (noting that "[s]ince passage of the APA, the sustained effort of administrative law has been to 'continuously narr[ow] the category of actions considered to be so discretionary as to be exempted from review'" (internal citation omitted)).

Application of the "strong presumption" of reviewability to both the § (a)(1) and § (a)(2) exceptions is particularly important in cases such as the present matter, where Congress has provided law to apply, the agency has exercised its coercive power, agency action has provided a focus for judicial review, and where the court's decision to decline judicial review under § (a)(2) contravenes the text of the statute and the overall structure of the law, may lead to significant economic harm, and encumbers private property. *Cf. Bennett*, 520 U.S. at 171-72, 176-77 (1997). The panel's failure to apply the "strong presumption" of reviewability is in error.

B. This Court has recognized that the exception for agency actions committed to agency discretion under § 701(a)(2) is narrow and requires "careful examination" of the underlying statute

The exceptions provided by § 701(a)(1) and (a)(2) are distinct. As noted in *Heckler*, the language of § 701(a) "clearly separates the exception provided by § (a)(1) from the § (a)(2) exception." 470 U.S. at 830. Section 701(a)(1) "applies when Congress has expressed an intent to preclude judicial review." *Id.* The Court has recognized that access to judicial review under § 701(a)(1) may only be restricted "upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

In contrast, the APA's legislative history indicates that § 701(a)(2) "is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Overton Park*, 401 U.S. at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). The "no law to apply" standard of § 701(a)(2) applies "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. Under such circumstances, the Court has stated that "the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Id.* The Court indicated that such a construction "avoids conflict with

the 'abuse of discretion' standard of review in § 706" because "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.* The exception created by § 701(a)(2) is "narrow" and remains so. *See id.* at 838 (citing *Overton Park*, 401 U.S. 402).

A determination that an exception under § 701(a)(2) applies to an agency action "requires careful examination of the statute on which the claim of agency illegality is based." *Webster*, 486 U.S. at 600. What a "careful examination" comprises is undefined. However, *Webster* suggests that the examination includes review of the language of the specific provision, as well as, "the overall structure" of the law at issue. *See id.* at 600-01 (analyzing "[t]he language of § 102(c) [of the National Security Act of 1947 ('NSA')]" and the "overall structure of the NSA" to determine that "Congress meant to commit individual employee discharges to the Director's discretion"). Thus, "careful examination" to determine if an exception under § 701(a)(2) applies requires something more than a conclusory determination that judicial review is precluded.

This Court has also recognized the existence of "certain categories of administrative decisions" that are precluded from review under § 701(a)(2) because the "courts traditionally have regarded" such categories "as 'committed to agency discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). Such categories have included the decision not to undertake an enforcement

action, *see Heckler*, 470 U.S. 821; the denial of a petition to reopen based only on "material error," *see ICC v. Locomotive Engineers*, 482 U.S. 270 (1987); the decision to terminate an employee for national security concerns, *see Webster*, 486 U.S. 592; and "[t]he allocation of funds from a lump-sum appropriation," *see Lincoln*, 508 U.S. at 191. These traditional categories represent those "areas" of agency decisionmaking "in which courts have long been hesitant to intrude." *See Franklin v. Massachusetts*, 505 U.S. 788, 819 (1992) (Stevens, J., concurring in part and concurring in judgment).

Effectively, the narrow exception that an agency action is committed to agency discretion under § 701(a)(2) applies when it falls within one of the traditional categories committed to agency discretion *or* is one of the "rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln*, 508 U.S. at 191 (quoting *Heckler*, 470 U.S. at 830). Under either instance, the determination requires a "careful examination" of the language of the provision and overall structure of the statute being challenged and is subject to the "strong presumption" in favor of reviewability.

C. The language of 16 U.S.C. § 1533(b)(2) and overall structure of the ESA do not preclude judicial review

The ESA does not explicitly preclude judicial review of critical habitat designations. Nor is the determination by FWS not to exclude Unit 1 from being designated as critical habitat under the ESA the type of administrative action that the courts have been hesitant to intrude upon. Thus, judicial review of the Service's decision is only barred if 16 U.S.C. § 1533(b)(2) is drawn in such a way that precludes a reviewing court from having a "meaningful standard against which to judge the agency's exercise of discretion." *See Heckler*, 470 U.S. at 830. To determine if the § 701(a)(2) exception applies to decisions not to exclude areas from critical habitat designations, a court must engage in a "careful examination" of the language of 16 U.S.C. § 1533(b)(2) and the overall structure of the ESA. Consistent with this Court's "strong presumption" in favor of judicial review of agency actions, a court's conclusory determination that judicial review is precluded is not sufficient to establish that the § 701(a)(2) exception applies.

Both the language of 16 U.S.C. § 1533(b)(2) and the overall structure of the ESA indicate that Congress did not intend to preclude judicial review of decisions not to exclude lands from a critical habitat designation, especially where, as here, significant economic impacts occur. The determination to inflict millions of dollars of economic harm on private Landowners based on erroneous analysis of the ESA is precisely the type of

agency action the APA was designed to combat. The ESA requires that

> [t]he Secretary *shall* designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2) (emphasis added). The language of 16 U.S.C. § 1533(b)(2) is "plainly [that] of obligation rather than discretion." *Bennett*, 520 U.S. at 172. The grant of discretion from Congress to an agency, as indicated by permissive statutory language, does not bar judicial review. *See, e.g.*, *Mulloy v. United States*, 398 U.S. 410, 415-16 (1970) ("permissive" statutory language does not permit a board to act "arbitrarily"); *Dickerson v. Sec'y of Defense*, 68 F.3d 1396, 1401-02 (D.C. Cir. 1995) ("permissive" statutory language such as "may" indicates "that Congress intends to confer some discretion on the agency" but "does not mean the matter is *committed* exclusively to agency discretion" (emphasis in original)).

Further, the language of 16 U.S.C. § 1533(b)(2) articulates a "meaningful standard against which to judge the agency's exercise of discretion." *See Heckler*, 470 U.S. at 830. As the panel recognized, 16 U.S.C. § 1533(b)(2) "articulates a standard for reviewing the Service's decision to exclude an area." Pet. App. 35a. Further, as noted by the dissenters, it is undisputed that the decision to include an area as critical habitat is also judicially reviewable. Pet. App. 160a n. 21 (Jones, J.). As Judge Jones stated, "the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1" as critical habitat. *Ibid.* (emphasis in original). Thus, the Service's decision not to exclude an area from a critical habitat designation is also judicially reviewable. As Petitioner argues, "[t]he panel's recognition that courts may review decisions *to exclude* should have compelled the conclusion that courts also may review decisions *not to exclude*." Pet. Weyerhaeuser Brief at 49 (emphasis in original).

The overall structure of the ESA also commands that judicial review is not precluded in this matter. In *Bennett*, the Court noted that the ESA serves an "overall goal of species preservation." 520 U.S at 176. However, that is not the ESA's only goal. The ESA's other "objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 176-77. This latter goal, of avoiding "needless economic dislocation" by the unintelligent pursuit of the FWS's "environmental

objectives" is precisely what is at issue in the present matter. The Service determined that it "did not identify any disproportionate costs" resulting from the designation of Unit 1 as critical habitat for the dusky gopher frog despite its own recognition that the designation could lead to nearly $34 million of lost development opportunities for the Landowners, which was not offset by its belief that the benefit of the designation was "best expressed" in unquantified "biological terms." *See* 77 Fed. Reg. 35118, 35140-141, JA188-JA190. The Fifth Circuit's failure to consider and carefully examine the structure of the ESA, and this goal in particular, was error. The designation of land, where a species cannot live, as critical habitat creates a clear judicially reviewable question. *See, e.g., Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

D. The Fifth Circuit failed to conduct the sort of "careful examination" required to establish that judicial review is precluded under § 701(a)(2)

The panel failed to engage in the type of "careful examination" of the language of 16 U.S.C. § 1533(b)(2) and overall structure of the ESA required by *Overton Park* and its progeny. To support its determination that judicial review was precluded, the panel erroneously relied on the Ninth Circuit's decision in *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), as well as the opinions of several district courts. *See* Pet. App. 34a-35a. In *Bear Valley Mut. Water Co.*,

the Ninth Circuit misquotes this Court's discussion in *Heckler* regarding reasons supporting the "general unsuitability for judicial review of agency decisions to refuse enforcement" and uses the misappropriated quote to support its determination that permissively written statutes are "presumptively unreviewable." *Compare Heckler*, 420 U.S. at 832 *with Bear Valley Mut. Water Co.*, 790 F.3d at 989. Notwithstanding the Ninth Circuit's failure to apply the correct framework articulated in *Heckler*, this determination is in clear opposition to the recognition that permissive statutory language does not bar judicial review.

Heckler argues that agency decisions to refuse enforcement proceedings are unsuitable for judicial review because they lack a focus for judicial review. As stated in *Heckler*, "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." 470 U.S. at 832 (emphasis in original).

In contrast, the Ninth Circuit guts the context of this statement from *Heckler* – that it relates solely to reasons why decisions not to enforce are generally unsuitable for judicial review – and instead states that "where a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" *Bear Valley Mut. Water Co.*, 790 F.3d at 989 (quoting *Heckler*, 470 U.S.

at 832) (ellipses in the original). This turns *Heckler* on its head.

Consideration of the facts of a case and the language and structure of laws is necessary to create context for a court's analyses and decisions. That context in turn may signal limitations on a court's rationale or holdings. Such limitations should be applied, or in the very least considered in subsequent matters. To strip, or separate facts and context and only apply bare statements from the caselaw, as the Ninth Circuit did in *Bear Valley Mut. Water Co.*, removes important guidance, not just for the courts, but for agencies and individuals as well. This erroneous analysis by the Ninth Circuit, supporting its determination that an agency's decision not to exclude critical habitat is not reviewable, is an improperly applied, irrelevant, and incorrect construction of this Court's limited rationale in *Heckler*. Any reliance on *Bear Valley Mut. Water Co.* is erroneous.

Similarly, the other cases cited by the panel also suffer comparable analytical infirmities. A review of the cases relied on by the panel indicate that the entire rationale in support of the unreviewability of decisions not to exclude lands from a critical habitat designation boils down to a single district court's approximately 255-word "analysis." *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 2006 WL 3190518, at *20 (E.D. Cal. 2006). In establishing that there are allegedly "no substantive standards by which to review the FWS's decisions not to exclude certain tracks" of land, the court in *Home Builders Ass'n of N. Cal.*, failed to

consider the overall structure of the ESA and only engaged in a limited analysis of 16 U.S.C. § 1533(b)(2)'s language. *See id.* Despite this, subsequent courts have continued to apply the same deficient analysis in *Home Builders Ass'n of N. Cal.* in support of finding that decisions not to exclude areas from critical habitat designations are not subject to judicial review. *See Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1034-35 (9th Cir. 2015), *aff'g* No. C 11-4118 (stating that any consideration of the dual objectives identified in *Bennett* was simply "foreclosed" by the Ninth Circuit's earlier decision in *Bear Valley Mut. Water Co.*); *Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n. 4 (D. Haw. 2014) (baldly citing the district court's determination in *Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, 2012 WL 6002511, at *7 (N.D. Cal. Nov. 30, 2012)); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (quoting *Home Builders Ass'n of N. Cal.*, 2006 WL 3190518, at *20). The APA provides the well-known arbitrary and capricious standard, and destroying millions in economic returns to private land holders to designate land upon which, by the Service's own analysis cannot live, is easily justiciable and subject to review.

The subsequent repetitions of the erroneous determination in *Home Builders Ass'n of N. Cal.*, does not cure it of its analytical faults. The bald parroting of prior court decisions falls short of *Webster*'s requirement that courts undertake "careful examination" of the language of the provision and the overall structure

of the law in determining whether the § 701(a)(2) exception applies. *See* 486 U.S. at 600-01. Such "careful examination" was never considered in *Home Builders Ass'n of N. Cal.*, a failure which infects subsequent reliance on that determination including the panel's decision at issue here.

The panel's decision contravenes existing law and precedent regarding the availability of judicial review of agency action and "play[s] havoc with administrative law." Pet. App. 156a (Jones, J., dissenting). The panel's determination, that the Service's decision not to exclude Unit 1 from a critical habitat designation was unreviewable, was error because the panel failed to undertake the proscribed "careful examination" as contemplated in *Overton Park, Heckler*, and *Webster*, and relied on analytically infirm caselaw.

CONCLUSION

For the foregoing reasons, the Court should reverse the Fifth Circuit, and remand for proceedings consistent with this Court's order.

Respectfully submitted,

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IN THE

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WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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INTEREST OF THE *AMICUS CURIAE*

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose mission is to restore the principals of the American Founding to their rightful, preeminent authority in our national life. The Center advances that mission by working to restore the Constitution's structural protections of our liberty, such as the separation of powers and the limits inherent in the grant of specifically enumerated powers.[1]

This Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has eroded these structural protections by allowing unelected, unaccountable agencies to wield vast amounts of legislative and judicial power. As the decision below demonstrates, the result of *Chevron* deference is a titanic administrative state that is inconsistent with the Constitution's separation of powers.

The Institute's senior scholars have been at the forefront of addressing the conflict between the modern administrative state and the separation of powers in their academic writings. *See, e.g.*, John A. Marini, *The Politics of Budget Control: Congress, the Presidency, and the Growth of the Administrative State* (1992); Charles R. Kesler, *Separation of*

[1] All parties have granted blanket consent to the filing of *amicus curiae* briefs. *See* Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity other than the Center, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. *See* Rule 37.6.

Powers and the Administrative State, in The Imperial Congress: Crisis in the Separation of Powers (Gordon S. Jones & John A. Marini eds. 1989); *see also* R.J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, Soc. Phil. & Pol'y, Jan. 2007, at 16. And the Center has been at the forefront of raising these issues as *amicus curiae* in several cases before this Court, including *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Michigan v. EPA*, 135 S. Ct. 2699 (2015); and *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). Given the Center's expertise in these matters, the Center believes that the Court would benefit from considering its views.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Constitution identifies three types of governmental power, and vests them in three different branches of government. Specifically, the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," Art. I, § 1; the "executive Power shall be vested in a President of the United States," Art. II, § 1, cl. 1; and the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," Art. III, § 1.

These grants of power are exclusive—a branch can neither "arrogate power to itself" nor "impair another [branch] in the performance of its constitutional duties." *Loving v. United States*, 517

U.S. 748, 757 (1996). Accordingly, this Court has invalidated encroachments on the legislative power, *see, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); the executive power, *see, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); and the judicial power, *see, e.g.*, *Stern v. Marshall*, 564 U.S. 462 (2011).

The Framers understood that this "separation of governmental powers into three coordinate Branches is *essential* to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (emphasis added). As James Madison explained, "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty" than the separation of powers. The Federalist No. 47, at 298 (C. Rossiter ed. 1961). Indeed, in Madison's view, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny." *Id.*

Judging by that standard, the modern administrative state has become far more of a threat to the separation of powers than the Framers could have imagined. Administrative agencies routinely "exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington v. FCC*, 569 U.S. 290, 312–13 (2013) (Roberts, C.J., dissenting). Moreover, the "accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of

modern American government." *Id.* at 313. This combination of legislative, executive, and judicial power has not yet reached "the very definition of tyranny," but "the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 315.

This Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), exacerbates these problems. *Chevron* requires courts "to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). This rule is based on a presumption of congressional intent: namely, that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in [a] statute," even if "Congress did not actually have an intent as to a particular result." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

But *Chevron*'s presumption about congressional intent "is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring). And *Chevron* distorts the separation of powers by permitting administrative agencies "to swallow huge amounts of core judicial and legislative power ... in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Id.* at 1149. By consolidating legislative, executive, and judicial power in the same hands, *Chevron* deference is undoubtedly a "powerful weapon in an agency's regulatory

arsenal." *City of Arlington*, 569 U.S. at 314 (Roberts, C.J., dissenting).

The decision below illustrates the corrosive effect that *Chevron* has on the separation of powers. Emboldened by *Chevron*, the Fish and Wildlife Service rewrote clear statutory text to give itself the power to designate as "critical habitat" virtually any part of the United States. The Fifth Circuit panel then abdicated its judicial responsibility to "say what the law is," instead deferring to the Service's interpretation without doing *any* meaningful analysis of the statutory text. The result is an administrative agency wielding vast amounts of legislative and executive power, without the meaningful check of judicial review.

In recent years, multiple justices have raised "serious questions about the constitutionality of [the Court's] broader practice of deferring to agency interpretations of federal statutes." *Michigan*, 135 S. Ct. at 2712–14 (Thomas, J., concurring); *accord Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). The Center believes that the Court should address these questions and hold that *Chevron* deference violates the separation of powers. At the very least, however, the Center believes that the Court should take steps to mitigate *Chevron*'s most pernicious effects.

ARGUMENT

I. *Chevron* deference undermines the separation of powers by allowing unelected, unaccountable agencies to wield vast amounts of legislative and judicial power.

Chevron requires courts "to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Michigan*, 135 S. Ct. at 2707. This rule is based on the presumption that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in [a] statute," even if "Congress did not actually have an intent as to a particular result." *Mead*, 533 U.S. at 229.

So understood, *Chevron* undermines the separation of powers in two ways. First, by giving agencies the power to speak with the "force of law," *Chevron* improperly transfers legislative power to those agencies. Second, by requiring courts to defer to an agency's interpretation of the law, *Chevron* improperly transfers judicial power to those same agencies.

A. Chevron's *delegation of policymaking authority to administrative agencies unlawfully places the power to make law and the power to enforce it in the same hands.*

In *Chevron*, this Court held that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). When

filling those gaps, agencies generally ask whether "there is a colorable interpretation that will support the policy result that the agency wants to reach," rather than searching for "the best objective interpretation of the statute." Raymond M. Kethledge, *Ambiguity and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017). Thus, *Chevron* presumes that, when a statute contains an ambiguity, Congress intended to give the agency the power to make policy with "the force of law." *Mead*, 533 U.S. at 229.

As an initial matter, *Chevron* did not identify any evidence that Congress actually intends to use statutory ambiguity as a way to delegate policymaking authority to agencies. And it would be difficult, if not impossible, to find such evidence because "Congress hardly ever states its instructions on the deference question with clarity." Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 Yale L.J. 1170, 1194 (2007). As a result, *Chevron* relies on a "fictional" intent, rather than one based on objective evidence, such as the statutory text. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989).

In addition, "*Chevron*'s inference about hidden congressional intentions seems belied by the intentions Congress has made textually manifest." *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorusch, J., concurring). For example, in the Administrative Procedure Act, Congress expressly provided that a "reviewing court shall decide all relevant questions of law" and "interpret constitutional and statutory

provisions." 5 U.S.C. § 706. But Congress said nothing—not a word—about its supposed intent to delegate policymaking authority to agencies. Thus, "*Chevron*'s claim about legislative intentions is no more than a fiction." *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring).

Even if the evidence supported *Chevron*'s claim about congressional intent, the delegation of policymaking authority to agencies would violate the separation of powers. When the Constitution was ratified, the public understood that "the formulation of generally applicable rules of private conduct" was part of the legislative power. *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment); *accord Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). As a result, *Chevron*'s transfer of policymaking authority to agencies "permit[s] a body other than Congress to perform a function that requires an exercise of the legislative power." *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring).

To be sure, this Court has held that the delegation of policymaking authority violates the Constitution only if Congress fails to provide "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Mistretta*, 488 U.S. at 372. But it is "no small question whether *Chevron* can clear [that standard]." *Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring). As then-Judge Gorsuch explained, "if an agency can enact a new rule of general applicability affecting huge swaths of the national economy one day and reverse itself the next (and that is exactly what *Chevron* permits, *see* 467

U.S. at 857–59), you might be forgiven for asking: where's the 'substantial guidance' in that?" *Id.* "And if an agency can interpret the scope of its statutory jurisdiction one way one day and reverse itself the next (and that is exactly what *City of Arlington*'s application of *Chevron* says it can), you might well wonder: where are the promised 'clearly delineated boundaries' of agency authority?" *Id.* at 1154–55.

In practice, *Chevron* gives agencies the power to speak with the "force of law" on matters of policy without even the slightest guidance from Congress. This Court should therefore hold that *Chevron* unconstitutionally transfers legislative power from Congress to administrative agencies.

B. Chevron's *delegation of interpretive authority to administrative agencies prevents courts from exercising their judicial power to "say what the law is."*

In *Chevron*, this Court held that, if an agency's interpretation of an ambiguous statute is reasonable, courts must "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980. Thus, *Chevron* presumes that, when a statute contains an ambiguity, Congress intended to make the agency the "authoritative interpreter" of that statute. *Id.* at 983.

Once again, *Chevron* did not identify any evidence that Congress actually intends to use statutory ambiguity in this way. And *Chevron* actually *ignored* several provisions that flatly contradicted this presumption.

For example, in a provision titled "Scope of Review," the Administrative Procedure Act provides that "the reviewing court shall decide all relevant questions of law," 5 U.S.C. § 706, which "suggests de novo review of statutory issues." John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 194 (1998). In addition, the Act provides that "the reviewing court shall ... interpret constitutional and statutory provisions." 5 U.S.C. § 706. That "places the court's duty to interpret statutes on an equal footing with its duty to interpret the Constitution," which courts always review de novo. Duffy, *supra* at 194. And the Act expressly provides that courts should apply deferential standards of review to certain questions—"just none that apply to review of legal questions." *Id.* *Chevron* did not reconcile its presumption about congressional intent with these provisions; indeed, *Chevron* failed to mention them at all.

Even if Congress wanted to make agencies the "authoritative interpreter" of ambiguous statutes, the delegation of interpretive authority to agencies would violate the separation of powers. The Framers understood that the "interpretation of the laws is the proper and peculiar province of the courts" and that it "belongs to [judges] to ascertain ... the meaning of any particular act proceeding from the legislative body." The Federalist No. 78, at 467 (Clinton Rossiter ed., 1961). And of course, this Court has repeated time and again that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). But *Chevron* forces judges "to abandon

what they believe is the best reading of an ambiguous statute in favor of an agency's construction." *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quotation marks omitted). Thus, *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive." *Id.* (quoting *Marbury*, 5 U.S. at 177).

That transfer of core judicial power to administrative agencies fails for at least two reasons. First, Congress does not have the power to authoritatively interpret the laws, so "it cannot delegate that power to an agency." *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment); *accord Bowsher v. Synar*, 478 U.S. 714, 726 (1986). And second, Article III prevents Congress from stripping the courts of the judicial power and transferring it to another branch. *Stern*, 564 U.S. at 484. This Court should therefore hold that *Chevron* unconstitutionally transfers judicial power from the courts to administrative agencies.

C. *As the decision below shows,* Chevron *deference encourages agencies to rewrite even clear statutes, and encourages courts to abdicate their judicial role.*

In theory, courts extend *Chevron* deference only when a statute is ambiguous. And "the question whether a statute is ambiguous" is supposed to "arise[] after, not before, a court applies traditional canons of interpretation." *OfficeMax, Inc. v. United States*, 428 F.3d 583, 592 (6th Cir. 2005) (Sutton, J.). As this Court has explained, "[i]f the intent of Congress is clear, that is the end of the matter; for

the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43.

But that is not the way it works in practice. *Chevron* encourages agencies to rewrite even clear statutes. Agencies know that "their interpretive decisions will be reviewed under a deferential version of *Chevron*"; thus, they feel "free to disregard congressional intent and impose their own policy views even when it is possible to have at least a good sense of how Congress would have wanted the agency to act." Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 784 (2010).

Likewise, *Chevron* encourages judges to bless an agency's rewriting of clear statutory text. As Judge Kethledge has explained, interpreting complex statutes is often similar to walking through a cedar swamp:

> The statute presents a dense undergrowth of sections and subsections and subsections within those. The answer to the specific question in the case might lie somewhere in those sections and subsections, but working through them is hard. And meanwhile the agency is there to offer a path already cleared. ... And so in agency cases it often seems that the court pauses only briefly at step one, without much effort to hack through the undergrowth, before proceeding straightaway down the cleared path of step two.

Kethledge, *supra* at 324.

This case exemplifies those corrosive effects. First, the Fish and Wildlife Service rewrote key parts of the Endangered Species Act to impose its own policy views. And second, the Fifth Circuit panel extended *Chevron* deference to the Service's manipulation of the Act—without *any* meaningful analysis of the statutory text.

As relevant here, the Endangered Species Act provides that, after determining that a species is endangered, the Service must "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i). The Act also provides that the Service cannot designate "specific areas outside the geographical area occupied by the species" unless that area is "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

Even a brief review of these provisions would have made clear that land can be designated as "critical habitat" only if it is, in fact, "habitat." *Id.* § 1533(a)(3)(A)(i); *see Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 640 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc). Likewise, a brief review of the Act would have made clear that land cannot be "*essential* for the conservation of the species" unless it plays *some role* in the conservation of that species. 16 U.S.C. § 1532(5)(A) (emphasis added); *see Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482–91 (5th Cir. 2016) (Owens, J., dissenting).

Emboldened by *Chevron*, however, the Service designated Unit 1 as critical habitat—even though

the dusky gopher frog did not live there, could not live there, and almost certainly would not live there in the future. That designation effectively deleted the words "habitat" and "essential for the conservation of the species" from the Act.

Moreover, the Service's deletion of these words led to absurd results. The Service's interpretation meant that land could be designated as "critical habitat" even though it was uninhabitable—what Judge Jones dubbed "the oxymoron of uninhabitable critical habitat." *Markle*, 848 F.3d at 644 (Jones, J., dissenting from denial of rehearing en banc). And the Service's interpretation meant that land could be "essential for the conservation" of the dusky gopher frog even though the frog would die if it was moved there. *Markle*, 827 F.3d at 480 (Owens, J., dissenting).

To mitigate this absurdity, the Service imposed two limitations on its reading of the Act—namely, that Unit 1 contained at least one feature that was critical to the frog's survival, and that this critical feature was rare and difficult to reproduce. *See id.* at 471, 472 n.20 (majority op.). Neither of these limitations, however, were grounded in the statutory text. *See Markle*, 848 F.3d at 651 (Jones, J., dissenting from denial of rehearing en banc).

Under this Court's precedents, the Fifth Circuit panel should have struck down the Service's rewriting of the Act. It is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). Yet that is

precisely what the Service did here—it rewrote the critical-habitat provisions so it could regulate land that is uninhabitable by the dusky gopher frog. Moreover, the Service's invention of two atextual limits on its own absurd reading of the statute "should have alerted [the Service] that it had taken a wrong interpretive turn." *Id.* Indeed, "[a]gencies are not free to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness." *Id.* (ellipsis and quotation marks omitted).

Although the Fifth Circuit panel should have invalidated the Service's interpretation, the panel deferred to that interpretation under *Chevron* without doing *any* meaningful analysis of the statutory text. For example, take the panel's discussion of the word "essential." The panel first quoted the relevant statutory provision, which provides that the Service cannot designate unoccupied areas as critical habitat unless they are "essential for the conservation of the species." *Markle*, 827 F.3d at 464 (quoting 16 U.S.C. § 1532(5)(A)(ii)). The panel then noted that Congress had not defined the word "essential." *Id.* Finally, without doing any further analysis of the statute's text, the panel concluded that Congress must have "delegated to the Secretary the authority to make that determination." *Id.* As the panel later put it: "Congress has not defined the word 'essential' in the [Endangered Species Act]. Hence the Service has the authority to interpret the term." *Id.* at 467.

The panel's analysis of the word "habitat" was even less rigorous. The panel first acknowledged the petitioners' argument that "Unit 1 is not currently

habitable by the frog." *Id.* at 468. The panel then dismissed the argument, stating that "[t]here is no habitability requirement in the text of the [Endangered Species Act]." *Id.* But the panel did not even *mention* 16 U.S.C. § 1533(a)(3)(A)(i), which provides that, after determining that a species is endangered, the Service must "designate any *habitat* of such species which is then considered to be critical habitat." (Emphasis added.) Nor did the panel attempt to define the word "habitat" or conclude that the word was ambiguous, before deferring to the Service's interpretation.

In short, the Fifth Circuit panel took one look at the "dense undergrowth of sections and subsections" in the Endangered Species Act, and headed straight for the "path already cleared" by the Service. Kethledge, *supra* at 324. That path may have been easier to walk down, but the Constitution's separation of powers requires more.

II. In light of these constitutional problems, the Court should overrule *Chevron* or—at the very least—take steps to mitigate its most pernicious effects.

Over the past few years, more than one justice has raised "serious questions about the constitutionality of [the Court's] broader practice of deferring to agency interpretations of federal statutes." *Michigan*, 135 S. Ct. at 2712–14 (Thomas, J., concurring); *accord Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). The Center believes that the Court should address those questions and hold that *Chevron* deference violates

the separation of powers. At the very least, however, the Court should take steps to mitigate *Chevron*'s most pernicious effects.

This case offers the Court the opportunity to take three such steps. First, the Court should reiterate that, before extending *Chevron* deference, courts must perform a rigorous analysis that uses all the traditional tools of statutory interpretation. Second, the Court should announce that *Chevron* deference does not extend to statutes that press the limits of the nondelegation doctrine. And third, the Court should reiterate that *Chevron* deference does not extend to agency actions that invoke the outer limits of Congress's enumerated powers.

A. *Courts should not extend* Chevron *deference without first performing a rigorous statutory analysis.*

This case exemplifies one of *Chevron*'s most pernicious effects—the encouragement of courts to bless an agency's rewriting of clear statutory text. *See supra* Part I.C. The Court should make clear that *Chevron* does not permit such an abdication of the judicial role.

This Court has previously explained that, before extending *Chevron* deference, courts must use all the "traditional tools of statutory construction" to determine whether "Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9. If so, "that intention is the law and must be given effect." *Id.*

Despite these instructions, many courts—like the Fifth Circuit panel here—"pause[] only briefly at step one, without much effort to hack through the

undergrowth, before proceeding straightaway down the cleared path of step two." Kethledge, *supra* at 324. Such an approach necessarily increases the number of times that courts defer to an agency's interpretation, and therefore exacerbates *Chevron*'s violation of the separation of powers.

To address this problem, the Court should reiterate that courts must perform a much more rigorous statutory analysis before extending *Chevron* deference. For example, the Fifth Circuit panel mistakenly believed that *Chevron* deference was appropriate simply because Congress left a word undefined. *See Markle*, 827 F.3d at 464, 467. The Court should correct that mistake, and reiterate that, "[w]hen a term goes undefined in a statute," courts must first "give the term its ordinary meaning" rather than jumping straight to *Chevron*. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012).

In addition, the Court should explain that "*Chevron* does not require anything like complete certainty about Congressional intent in order to decide an issue at step one." Patrick J. Smith, *Chevron's Conflict with the Administrative Procedure Act*, 32 Va. Tax Rev. 813, 839 (2013). Of course, it is impossible to define precisely when a statute is ambiguous enough to require *Chevron* deference. But that does not mean that the Court cannot provide more concrete guidance. For example, the Court should clarify that a statute like the Endangered Species Act is not ambiguous simply because it "is complicated, even very complicated." Kethledge, *supra* at 319.

As Justice Scalia explained, a judge "who finds *more* often ... that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists." Scalia, *supra* at 521. Because Justice Scalia took that approach, it was "relatively rare that *Chevron* ... require[d] [him] to accept an interpretation which, though reasonable, [he] would not personally adopt." *Id.* This Court should encourage lower courts to take the same approach. Doing so would not cure *Chevron*'s violations of the separation of powers, but it would encourage courts to rigorously use their judicial power to "say what the law is," rather than outsourcing that task to administrative agencies.

B. *Courts should not extend* Chevron *deference when the statute at issue presses the limits of the nondelegation doctrine.*

This case also exemplifies how the combination of *Chevron* deference and a permissive nondelegation doctrine can seriously undermine the separation of powers.

Chevron is built on two closely related presumptions. First, when a statute is ambiguous, Congress wants the agency "to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 740–41 (1996). And second, "the more discretion Congress gives the agency, the more deference courts should give to agency interpretations of law." Thomas W. Merrill, *Rethinking Article I, Section 1: From*

Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2172 (2004). In combination, these two presumptions mean that, "the more discretionary (less clear) the statute, the more power flows to the agency." *Id.* at 2181 n.292.

In theory, the nondelegation doctrine would seem to place a limit on these presumptions. After all, the "premise of the nondelegation doctrine ... is that the more discretion Congress gives the agency, the closer Congress comes to acting unconstitutionally, and hence the more important it becomes that the courts either supply a narrowing construction of the statute or remand the matter to Congress." *Id.* at 2172. As a practical matter, however, this Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (quotation marks omitted). Consequently, both *Chevron* and the nondelegation doctrine shift power in the same direction—toward the administrative state. The result is a "potent mix" of legislative, executive, and judicial power. *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring).

Ideally, the Court would address this problem by overruling the *Chevron* doctrine *and* reinvigorating the nondelegation doctrine. At a minimum, however, the Court should refuse to apply *Chevron* and the permissive nondelegation doctrine at the same time. When Congress delegates a large amount of policymaking authority to an agency, "how much leeway judges give to administrative exercises of discretion is critically important." Ronald A. Cass,

Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion, 83 Geo. Wash. L. Rev. 1294, 1298–99 (2015). Indeed, the standard of review is "effectively the last opportunity for law to constrain official power." *Id.* Thus, when a statute gives largely unbridled discretion to an agency, courts should refuse to defer to the agency's interpretation of that statute. Instead, courts should exercise the full scope of their judicial power to seek the statute's objective meaning.

To be sure, some statutes provide little to no guidance about which policy goals the agency should pursue, making it difficult, if not impossible, to determine the statute's objective meaning. *See Dep't of Transp.*, 135 S. Ct. at 1251 (Thomas, J., concurring in the judgment) (collecting cases in which Congress provided a minimal degree of specificity). But that does not mean that courts should defer to the agency's exercise of policymaking authority. On the contrary, the court's duty in such a case is to refuse to enforce the statute on the ground that "[a]n unintelligible text is inoperative." Antonin Scalia & Bryan A. Garner, *Reading Law* 134 (2012). Congress would then have the opportunity to clarify the statute—thus preserving our system of separated powers.

This case provides an apt example of this problem. In the Service's view, the Endangered Species Act provides that "virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the

species on it." *Markle*, 827 F.3d at 483 (Owens, J., dissenting). For the reasons explained in Part I.C, the Center believes that the Act's grant of authority is much more limited. If the Service's view is correct, however, then the Act would give the Service "unfettered discretion to designate land as 'critical habitat' so long as scientists agree that uninhabitable land can be transformed into habitat." *Id.* at 488. That is a staggering amount of discretion, and it is inconsistent with the separation of powers. As a result, the Court should refuse to extend *Chevron* deference and, if necessary, refuse to enforce the Act as unintelligible.

C. *Courts should not extend* Chevron *deference when the agency's action invokes the outer limits of Congress's enumerated powers.*

Finally, this case exemplifies the danger of allowing an agency to stretch a statute beyond the limits of Congress's enumerated powers. As explained below, the application of the Endangered Species Act to noncommercial, wholly intrastate species such as the dusky gopher frog raises substantial constitutional questions about the scope of the Commerce Clause. The Service then *extended* the Act's reach by designating Unit 1 as "critical habitat," even though the frog does not and cannot live there. That unlawful extension does not deserve *Chevron* deference.

When an agency's interpretation of a statute "invokes the outer limits of Congress' power," this Court "expect[s] a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook*

Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001). That clear-statement rule is based on the Court's "prudential desire not to needlessly reach constitutional issues and [its] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172–73. Thus, when an agency's interpretation of a statute would raise "serious constitutional problems," this Court "will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 173 (quotation marks omitted). In doing so, the Court will "not extend *Chevron* deference" to the agency's interpretation. *Id.* at 172.

This case involves, at the very least, the outer limits of Congress's power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Under this Court's precedents, the Commerce Clause allows Congress to regulate "the use of the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000). Although this power is expansive, it remains "subject to outer limits." *United States v. Lopez*, 514 U.S. 549, 557 (1995). For example, the Commerce Clause applies only to pre-existing activity. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 550–51 (2012) (opinion of Roberts, C.J.); *id.* at 649–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). And that pre-existing activity must be "economic." *Lopez*, 514 U.S. at 559–60.

Here, the Service's designation of Unit 1 as "critical habitat" raises substantial constitutional questions regarding Congress's commerce power. The designation of Unit 1 plainly does not count as a regulation of "the use of the channels of interstate commerce." *Morrison*, 529 U.S. at 609. And the designation of Unit 1 cannot be sustained as a regulation of "things in interstate commerce." *Id.* As the Service acknowledges, the dusky gopher frog "is currently known to occur only within the State of Mississippi," and has no economic value. 77 Fed. Reg. 35118, 35120, 35127. Unsurprisingly, therefore, there is no commerce involving the frogs.

The Fifth Circuit panel upheld the Service's designation, however, as a regulation of activities that substantially affect interstate commerce. *Markle*, 827 F.3d at 475. But the panel's analysis was misguided at best.

The panel framed the question presented as "whether the *federal action* substantially affects interstate commerce." 827 F.3d at 475 (emphasis added) (brackets and quotation marks omitted). To answer that question, the panel analyzed whether "*the designation of Unit 1*" was "economic or commercial in nature." *Id.* at 476 (emphasis added). But the issue was not "whether the challenged *regulation* substantially affects interstate commerce"; it was "whether the *activity being regulated* does so." *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (emphasis added). Thus, the panel never addressed the relevant question—whether the activity being

regulated substantially affects interstate commerce. And the answer to that question is far from clear.

To take one example, it is not clear what activity the Service was regulating when it designated Unit 1 as critical habitat. In most cases involving the Endangered Species Act, the regulated activity at issue is the "tak[ing] of any endangered species without a permit or other authorization." *See People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 995 (10th Cir. 2017) (citing 16 U.S.C. § 1538(a)(1)(B)). But here, there are no dusky gopher frogs to "take" in Unit 1—the frogs do not and cannot live there.

To be sure, the word "take" includes the concept of "harm," 16 U.S.C. § 1532(19), which the Secretary of the Interior has interpreted as including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering," 50 C.F.R. § 17.3. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995). But the Service has not identified any activity that "actually kills or injures" the dusky gopher frog because, once again, the frog does not and cannot live in Unit 1.

Perhaps the Service would say that it is regulating any activities that would trigger the Act's consultation process, *see* 16 U.S.C. § 1536, and that regulating those activities is an "essential part[] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 24–25 (2005) (quotation marks

omitted). But it is difficult to see how the designation of Unit 1 is "essential" to the Endangered Species Act, given that the dusky gopher frog does not and cannot live there.

Because "the precise object or activity that, in the aggregate substantially affects interstate commerce" is "not clear," the Service's designation of Unit 1 raises "significant constitutional questions." *Solid Waste Agency*, 531 U.S. at 173–74. Thus, this Court should "not extend *Chevron* deference here." *Id.* at 172.

CONCLUSION

The Framers understood that the "separation of governmental powers into three coordinate Branches is *essential* to the preservation of liberty." *Mistretta*, 488 U.S. at 380 (emphasis added). As this case shows, however, *Chevron* deference is eroding this fundamental principle of American government. The Court should take this opportunity to overrule *Chevron* or—at the very least—take whatever steps it can to limit the damage.

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IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

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IN THE

Supreme Court of the United States

NO. 17-71

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of 3 million companies and professional organizations of every size, in every industry sector, and

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[1] Counsel of record for petitioner and respondents consented to the filing of this brief by filing blanket consents with the Clerk. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community. Many of the Chamber's members are landowners whose private property may be saddled with additional and unreasonable regulatory burdens under the Endangered Species Act ("ESA") if the "critical habitat" designation authority asserted by the United States Fish and Wildlife Service ("Service") in this case is allowed to stand. And all of the Chamber's members have an interest in reaffirming courts' duty under *Chevron*[2] to engage in independent statutory interpretation, thus ensuring administrative agencies do not impose regulatory burdens that exceed lawful bounds.

SUMMARY OF ARGUMENT

The opinion below is emblematic of judicial decisions that disregard this Court's repeated insistence that *Chevron* requires courts to take seriously the statutory limits on agencies' authority and apply them rigorously in all cases. For deference under *Chevron* to be consistent with the legislative power to make law, the judicial duty to "say what the law is,"[3] and the executive obligation to faithfully execute it, the courts must exhaust the traditional tools of statutory construction to inquire whether the text of the statute written by Congress answers the question presented. Applying *Chevron* deference without first undertaking this intensive investigation violates fundamental principles of separation of powers.

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[2] See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (requiring judicial deference to certain executive agency statutory interpretations).

[3] See *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

The claim to sweeping agency power uncritically accepted by the court of appeals allows the Service to burden private property across the country with costly ESA regulation virtually at will. Even worse, the lower court's fundamental misapplication of *Chevron* in this case reinforces a disturbing trend among lower courts to take a "hands off" approach to *Chevron* analysis. This Court should remind federal courts that they are required to employ rigorous methods of statutory interpretation before invoking ambiguity or bureaucratic expertise as a reason to cede discretion to federal agencies.

ARGUMENT

I. FEDERAL COURTS MUST CONDUCT A RIGOROUS TEXTUAL ANALYSIS WHEN REVIEWING AGENCY ACTION UNDER THE *CHEVRON* FRAMEWORK

This dispute turns on the meaning of the term "critical habitat" in 16 U.S.C. § 1533(a)(3)(A)(i). In particular, the ESA provides that the Service "to the maximum extent prudent and determinable * * * shall * * * designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i).

Without first considering whether "Congress's meaning" was "discern[able]" with the aid of "the traditional tools of statutory construction," *SAS Institute Inc.* v. *Iancu*, No. 16-969, slip op. at 11-12 (U.S. Apr. 24, 2018) (quoting *Chevron*, 467 U.S. at 843 n.9), the court of appeals deferred under *Chevron* to the Service's interpretation, which stretches "critical habitat" to include private land that is not "habitat" at all, much less *critical* habitat. This resulted in upholding the Service's designation as "critical habitat" land that all parties agreed the endangered species cannot possibly inhabit. See Pet. App. 138a (Jones, J., dissenting from denial of rehearing en banc) ("The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute."). In doing so, the Fifth Circuit ignored this

Court's repeated insistence that *Chevron* deference is appropriate *only* when the court has determined—after exhausting the traditional tools of statutory construction—that the text of the statute does not resolve the question at issue. This Court should reverse the decision below and reinforce that *Chevron* demands searching textual analysis from courts before any deference is shown to an agency's statutory interpretation.

A. *Chevron* requires careful analysis of the statutory text before deference is given

1. It is well established that "an administrative agency's power to promulgate legislative regulations" is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). If the court determines that Congress has spoken clearly on the disputed question, then "that is the end of the matter," *Chevron*, 467 U.S. at 842. The agency is due no deference, for Congress has left no gap for the agency to fill. *Id.* at 842-844. Only "if the statute is silent or ambiguous with respect to the specific issue," does the Court move on to ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. This is no mere speed bump: a court may defer to the agency's interpretation only if it first "find[s] [it]sel[f] unable to discern Congress's meaning" "after 'employing traditional tools of statutory construction.'" *SAS Institute*, slip op. at 11-12 (quoting *Chevron*, 467 U.S. at 843 n.9).

Robust enforcement of *Chevron* safeguards the separation of powers by ensuring that courts—not agencies—say what the law is. The judicial duty—and the Administrative Procedure Act's charge that courts resolve "all relevant questions of law," 5 U.S.C. § 706—demand that courts exhaust the traditional tools of construction in every case where statutory interpretation is required. At the very least, that duty requires careful investigation of

the ordinary meaning of the words of the statute and rigorous analysis of the statute as a whole, not a single provision viewed in isolation. See *Carcieri* v. *Salazar*, 555 U.S. 379, 387-389 (2009) (reversing lower court's application of deference that failed to analyze "the ordinary meaning" of the text and "the natural reading of the [provision in question] within the context of the [statute]").

2. When reviewing agency interpretations of allegedly ambiguous statutory provisions, this Court often ends the *Chevron* analysis at the outset. Indeed, in recent Terms, this Court has repeatedly rejected requests for deference to an administrative interpretation because the text of the statute resolves the question at issue. See, *e.g.*, *SAS Institute*, slip op. at 12 (rejecting plea for deference to purportedly ambiguous statute because "after applying traditional tools of interpretation," the Court's "duty [wa]s to give effect to the [statutory] text"); *Digital Realty Trust, Inc.* v. *Somers*, No. 16-1276, slip op. at 18-19 (Feb. 21, 2018) ("Because Congress has directly spoken to the precise question at issue, we do not accord deference [under *Chevron*] to the contrary view advanced by the SEC['s]" regulation."); *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation."); *Coventry Health Care* v. *Nevils*, 137 S. Ct. 1190, 1198 n.3 (2017) ("Because the statute alone resolves this dispute, we need not consider whether *Chevron* deference attaches to OPM's 2015 rule."); *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1979 (2016) ("Even assuming, *arguendo*, that the preamble to the agency's rulemaking could be owed *Chevron* deference, we do not defer to the agency when the statute is unambiguous."); *FERC* v. *Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773 n.5 (2016) ("Be-

cause we think FERC's authority clear, we need not address the Government's alternative contention that FERC's interpretation of the statute is entitled to deference under *Chevron*."); *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1989 (2015) ("Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron*.").[4] In most of these instances, the Court reversed a lower-court decision because that court failed to rigorously construe the statute before applying deferential review to the agency's regulation.

The court below, in upholding the Service's designation of Unit 1 as "unoccupied critical habitat" based on deference to the Service, similarly skated past the textual analysis required by *Chevron*. Without first attempting to "discern Congress's meaning" by exhausting "traditional tools of interpretation," *SAS Institute*, slip op. at 11-12, or even identifying any ambiguity in the term "critical habitat," the Fifth Circuit deferred to the Service's sweeping and unprecedented interpretation of that term to include *non*-habitat, see Pet. App. 23a. The lower court's approval of an agency's statutory interpretation that defies both common sense and ordinary English usage is emblematic of recent lower-court decisions that ignore statutory text in contravention of the *Chevron* framework. Had the court of appeals undertaken the required analysis, the statute's text would have resolved the issue—as it has in so many of this Court's recent decisions—without the need for *Chevron* deference.

3. While this Court has led by example in applying robust textual analysis before turning to executive regulations, there is evidence that lower courts follow in these

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[4] See also *Hawkins* v. *Cmnty. Bank of Raymore*, 761 F.3d 937, 941-942 (8th Cir. 2014) (rejecting agency interpretation as violative of statutory text and describing contrary opinion of the Sixth Circuit as "manufactur[ing] ambiguity" that did not exist), *aff'd by an equally divided court*, 136 S. Ct. 1072 (2016).

footsteps inconsistently at best. Empirical studies reveal that lower courts apply a far stronger dose of deference under *Chevron* than does this Court. Barnett & Walker, *Chevron* in the Circuit Courts, 116 Mich. L. Rev. 1, 6 (2017). Scholars have thus perceived a difference between the "*Chevron* Supreme" on offer in this Court and the "*Chevron* Regular" retailed by the lower courts. *Ibid.*

Much of the recent criticism leveled at *Chevron* doctrine may stem from courts' eagerness to resort to deference without expending judicial efforts to interpret statutes by employing all available tools. Courts' seeming readiness to declare statutory ambiguity and resort to a tidy, agency-proffered solution, rather than diving headlong into the muck and mire of statutory construction, is understandable. But it strains our system of separated powers. If *Chevron* is to be consistent with the Constitution, judges must be freed—in fact, duty-bound—to exercise the entire scope of Article III interpretive powers before deferring to an executive agency.

The time may be ripe for this Court to provide explicit—rather than merely exemplary—guidance along these lines. This brief discusses some of the relevant *Chevron*-threshold principles that are scattered throughout this Court's precedents. And judges and scholars have proposed more systematic doctrinal clarifications for this Court's consideration. See, *e.g.*, *id.* at 72 (proposing that the Court provide guidance on "what are the 'traditional tools of statutory construction' to which *Chevron* referred" and whether there is "an 'order of battle' in which the circuit courts proceed through certain steps or interpretive canons to interpret statutes"); Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2121 (2016) (arguing for "reduc[ing] the number of canons of construction that depend on an initial finding of ambiguity"—such as *Chevron*—in favor of courts' "seek[ing] the best reading

of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons"); *id.* at 2154 (arguing that "in cases where an agency is * * * interpreting a specific statutory term or phrase, courts should determine whether the agency's interpretation is the best reading of the statutory text," rather than making "ambiguity" a trigger for agency deference). Further instructions from this Court may ensure that *Chevron* is consistent with the constitutional design.

B. Properly applying *Chevron* would have required rejecting the Service's interpretation

As Judge Jones's dissent from denial of rehearing en banc recognized, "the panel * * * neglected" "to undertake holistic statutory interpretation." Pet. App. 131a-132a. Instead, its analysis focused exclusively on the statute's definitional provision. Because that provision—viewed in a vacuum—does not "appear to require that a species actually be able to inhabit its 'unoccupied critical habitat,'" the court of appeals concluded that the Act does not contain a habitability requirement. *Id.* at 131a. As Judge Jones explained, however, that conclusion is incorrect. *Id.* at 131a-135a.

The ESA states that the Service

> shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat * * * and * * * may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)-(ii). The meaning of this provision dictates that whatever is "critical habitat" must first be "any habitat of such species." The fact that the separate statutory definition of "critical habitat" includes both

areas occupied by the species and areas unoccupied by the species does not alter the fact that all such areas must be within the "habitat of such species"—*i.e.*, they must at least be capable of habitation by that species. The majority below did not even confront this ordinary-meaning roadblock, which stems from the very provision that empowers the Service to designate "critical habitat" in the first place. It instead peremptorily reasoned that Congress had delegated broad authority to the Service and thus proceeded to apply *Chevron* deference. Pet. App. 15a-16a.

The lower court's interpretation also overlooks the ordinary meaning of the word "habitat" itself, which is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). See also The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"). Applying that ordinary meaning here, Unit 1 cannot be "habitat" because the dusky gopher frog does not—and indeed could not—"naturally live[] and grow[]" there. Pet. App. 23a-24a. And because Unit 1 cannot be habitat, it obviously cannot be *critical* habitat. Pet. App. 60a (Owen, J., dissenting) ("An area cannot be essential for use as habitat if it is uninhabitable.") (quotation marks omitted). This Court has rejected similar agency attempts to stretch statutory terms beyond their ordinary meaning. See, *e.g.*, *Freeman* v. *Quicken Loans*, 132 S. Ct. 2034, 2041-2042 (2012) (rejecting agency's bid for deference because "it is normal usage that, in the absence of contrary indication, governs our interpretation of texts").

The court of appeals' conclusion that the ESA contains no habitability requirement demonstrates the problems that arise when courts fail to apply the rigorous textual

analysis required by *Chevron*. The court of appeals deferred to the Service's wrongheaded interpretation of the ESA without even pausing to ask whether any genuine statutory ambiguity justified doing so. By breezing past that essential question, the court of appeals ignored the plain meaning of the word "habitat" and the essential limit Congress placed on the Service's discretion by using that term consistently throughout the statutory scheme. See *id.* at 2044 (holding that there is no "warrant for expanding [a statutory provision] beyond the field to which it is unambiguously limited").

Instead of paying attention to the words Congress used to cabin the agency's discretion, the court of appeals mistakenly focused on the Service's expertise and the various scientific findings allegedly justifying its conclusion that Unit 1 is "essential to the conservation" of the frog. See Pet App. 162a (Jones, J.) ("The panel majority's nontextual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats."). But no amount of subject-matter expertise can give an agency license to rewrite the terms of a statute. See *Chevron*, 467 U.S. at 842-843 & n.9 (If, by "employing traditional tools of statutory construction," the court determines that Congress' intent is clear, "that is the end of the matter."); *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2445-2446 (rejecting EPA's "rewriting of the statutory thresholds" and "reaffirm[ing] the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate"). Scientific skill does not give birth to interpretative authority. No matter how much technical analysis supported the Service's conclusion that Unit 1 is "essential to the conservation" of the frog, if Unit 1 is not "habitat," the Service lacks authority to designate it as "critical habitat."

Nor does the fact that *other* aspects of the ESA might be ambiguous change the analysis. The court of appeals apparently assumed that the phrase "essential to the conservation of the species" is ambiguous. Even if that were so, it is irrelevant because only *habitat* "essential to the conservation of the species" is eligible for designation, and Unit 1 cannot be habitat. The lower court's error—ignoring a textual limitation on agency power in the name of deference triggered by a secondary textual ambiguity—is symptomatic of a broader misapplication of *Chevron* that has been the subject of close attention by this Court in recent years. See, *e.g.*, *Kingdomware Techs.*, 136 S. Ct. at 1978 (rejecting lower court's reliance on statute's "prefatory clause" to "change the scope of the [statute's] operative clause"); *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 525 (2009) ("[T]he presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of [the statute]").

This case provides a much-needed opportunity for the Court to further clarify the proper approach to statutory interpretation under the *Chevron* framework.

II. THE FIFTH CIRCUIT'S DECISION CONTRAVENES THIS COURT'S TEACHING THAT A VIGOROUS APPLICATION OF *CHEVRON*'S REASONABLENESS TEST IS AN ESSENTIAL PROTECTION AGAINST ULTRA VIRES AGENCY ACTION

The lower court's fundamental misapplication of *Chevron*'s reasonableness analysis further underscores the need for this Court to refine the second step of the *Chevron* rubric.

This Court has emphasized that "[e]ven under [*Chevron*']s deferential standard, * * * 'agencies must operate within the bounds of reasonable interpretation.'" *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015). Thus, "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive

gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Id.* at 2708. Put another way, "where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1874 (2013).

The Court enforced this boundary in *AT&T Corp.* v. *Iowa Utilities Board*, holding an agency interpretation unreasonable because it was "not in accord with the ordinary and fair meaning" of the statutory terms. 525 U.S. 366, 389-390 (1999). Likewise, in *Department of Treasury* v. *FLRA*, this Court set aside the Department's interpretation as "not reasonable" because it was "flatly contradicted by the language" and the "plain text" of the statute. 494 U.S. 922, 928 (1990).

As Judge Silberman put it: "Much of the recent expressed concern about *Chevron* ignores that *Chevron*'s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Global Tel*Link* v. *FCC*, 859 F.3d 39, 59 (D.C. Cir. 2017) (Silberman, J., concurring). This case presents yet another example of "those kinds of agency tactics." *Ibid.*

Even assuming the relevant statutory terms are ambiguous, the interpretation embraced by the opinion below leads to absurd results that run afoul of *Chevron*'s litmus test of reasonable interpretation. As Judge Jones explained:

> Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must

> contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C.* v. *U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.
>
> According to the panel majority, however, Unit 1 is "critical habitat" despite being unoccupied by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it easier to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land.

Pet. App. 143a.

That bizarre arrangement is at odds with uniform precedent interpreting the ESA, the statute's purpose, and its legislative history, all of which demonstrate that an unoccupied critical habitat designation was "intended to be *different* from and *more demanding* than an occupied critical habitat designation." *Id.* at 149a; see *id.* at 145a-150a. But because the court of appeals rendered *Chevron* a mere speed bump, it disregarded the relevant interpretive evidence and accepted a construction that makes it easier to designate as critical habitat land on which the species cannot survive (like Unit 1) than land which is occupied by the species. That approach to *Chevron* ignores this Court's repeated holdings that the framework should be applied rigorously to discipline unreasonable agency in-

terpretations—even those eligible for deference—to prevent blatant executive overreach. Pet. App. 49a (Owen, J., dissenting) ("The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government.").

Judge Owen's dissent further highlights the impermissibility of the Service's (and the panel majority's) interpretation. As she explained, that interpretation "depends entirely on adding words to the Act that are not there." Pet. App. 63a. Specifically, the "linchpin to the majority's holding" is that the Service must have "unfettered discretion to designate land as 'critical habitat' so long as * * * at least one physical or biological feature[ ] * * * essential to the conservation of the species' [is] present" on the land. *Id.* at 63a-64a (quotation marks omitted). By permitting "the Service to designate an area as 'critical habitat' if it has '*a critical feature*,'" the opinion below allowed the Service to "re-write[ ] the Endangered Species Act." *Id.* at 65a (emphasis in original).

The Service's interpretation exceeds the bounds of permissible interpretation and thus fails under *Chevron*. Instead of uncritically deferring to it, the court of appeals should have been "alarmed that [the Service] felt sufficiently emboldened by [this Court's *Chevron*] precedents to make the bid for deference that it did here." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446. By "recogniz[ing] the authority claimed by [the Service]," the decision below "deal[t] a severe blow to the Constitution's separation of powers." *Ibid.*

III. The Decision Below Will Have Far-Reaching Implications For Landowners Across The Country

This case's importance extends beyond the core doctrines of administrative law discussed above to practical issues of ESA enforcement that affect myriad landowners across the Nation.

Limiting the Service's proper role with respect to "critical habitat" designations is vital. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to result in the destruction or adverse modification of critical habitat." *Otay Mesa Prop., L.P.* v. *U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quotation marks omitted). In this case alone, the agency's interpretation allowed it to impose $34 million in costs on the landowner petitioners merely because the Service found a single feature essential to the dusky gopher frog's survival on their land. Pet. App. 158a-159a. In the view of the Chamber and its many landowner members, petitioner is correct to warn that the Service's "single essential feature" rule will likely impose billions of dollars in costs on landowners across the country. Weyerhaeuser Pet. 4. As Judge Owen's dissent explained, the decision below threatens to subject large swaths of the United States to intensive federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Pet App. 49a. Even worse, under the lower court's holding, the Service's designations are largely immune from judicial review. *Id.* at 31a-34a (majority opinion); Weyerhaeuser Br. 45-56.

If the opinion below stands, the Service will be "encourage[d]" to pursue "aggressive, tenuously based interference with property rights." Pet. App. 162a (Jones, J.). Because the court of appeals—and the Service—relied on

"non-textual interpretations of the ESA" in violation of *Chevron*, this Court should reverse the decision below and enforce "Congress's efforts to prescribe limits on the designation of endangered species' habitats." *Ibid.*

CONCLUSION

The Chamber respectfully requests that the judgment of the Court of Appeals be reversed.

Respectfully submitted.

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No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,
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v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,
Respondents.

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BRIEF OF *AMICI CURIAE* COALITION FOR A SUSTAINABLE DELTA, SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, AND WESTERN GROWERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The San Luis & Delta-Mendota Water Authority (SLDMWA) consists of twenty-eight public water agencies serving approximately 2.1 million acres within the western San Joaquin Valley, San Benito, and Santa Clara counties in California. SLDMWA operates and maintains certain federal Central Valley Project facilities, delivering up to 3 million acre feet of water per year within SLDMWA's member agencies' service areas, which include some of the most productive farmland in the country, the Silicon Valley, and the largest contiguous wildlife refuge west of the Mississippi River.

Coalition for a Sustainable Delta (Coalition) is a non-profit comprised of agricultural water users and individuals in the San Joaquin Valley in California. The Coalition and its members depend on reliable water supplies from California's Sacramento-San Joaquin Delta for their livelihoods and economic well-being. The purpose of the Coalition is to (1) promote the long-term, ecological health of the Sacramento-San Joaquin Delta and its native species and (2) ensure a sustainable, reliable water supply for persons and entities engaged in agricultural pursuits in the San Joaquin Valley.

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* and their counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. *Amici curiae* file this brief with the written consent of all parties, copies of which are on file in the Clerk's Office.

Western Growers Association (WGA) is a trade association that represents local and regional family farmers growing fresh produce in Arizona, California, and Colorado. WGA members and their workers provide over half the nation's fresh fruits, vegetables, and tree nuts, including nearly half of America's fresh organic produce. WGA advocates in legislative, regulatory, and judicial forums to ensure that environmental policy is informed by sound science and proven data.

Members of SLDMWA, the Coalition, and WGA must operate within the limitations imposed by the federal government under the Endangered Species Act (ESA) and a myriad of other environmental statutes. Increasingly, these statutes significantly influence how and to what extent regulated entities, including SLDMWA, the Coalition, and WGA, are able to access vital natural resources such as water. SLDMWA, the Coalition, and WGA have an interest in ensuring that agency administration and application of these statutes is subject to effective judicial review, consistent with the separation of powers established by the Constitution. This case highlights the importance of that interest.

SUMMARY OF ARGUMENT

The growth of the Executive Branch within our constitutional democracy is, to a degree, a predictable byproduct of our increasingly complex society. It is also a consequence of the increasing inability of the Legislative Branch to reauthorize many of the statutes initially enacted during the 1970s, including the ESA, which now comprise the modern body of environmental law. Even so, the exercise of power by the Executive

Branch remains subject to the strictures imposed by the Constitution. The functions of Congress in enacting the laws and the Judiciary in interpreting them are well established. The functions of the Judiciary, such as judicial review of agency decisions, take on greater, rather than lesser, importance in the context of the growth of the Executive Branch. Unfortunately, judicial review of agency decisions has been severely constrained by judicially-created doctrines requiring deference to both agency legal and technical determinations. These doctrines, which generally trace back to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) impact the way in which courts review agency decisions and ultimately whether there is room for the courts to decide what the law is and correct agency errors. The Judiciary's constitutional role has been further undermined in the context of the ESA by the notion that the requirements imposed by the ESA trump those imposed by other statutes and must be implemented without regard to cost. The Court's ESA jurisprudence post *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), as well as amendments to the statute itself, shows that this notion is misguided.

These transgressions are not academic. This case is a prime example of how judicial review of agency decision-making is essential to enforcing the Constitution and laws and to promoting the separation of powers. Congress adopted the ESA to serve an important purpose, but implementation of the ESA often comes with substantial societal costs. Blind deference to agency legal determinations can lead to a

circumstance where (as here) agency authority is unmoored from the language and intent of the ESA. Similarly, blind deference to agency technical determinations can lead to a circumstance where (again, as here) courts rubber stamp agency conclusions. In both of these circumstances, agency action can impose significant costs on regulated entities. It can also lead to a circumstance where listed species are denied the degree of protection Congress intended.

The Court should rule for Petitioner, and in doing so emphasize the limits on Executive Branch authority to interpret the law and restore the vitality of the hard look doctrine as a yardstick for judicial review of agency decisions under the ESA and other federal statutes.

ARGUMENT

I. THE JUDICIARY HAS A CONSTITUTIONAL DUTY TO INTERPRET THE LAW

A. JUDICIAL REVIEW OF AGENCY DECISION-MAKING IS ESSENTIAL

As the Court examines the U.S. Fish and Wildlife Service's (Service) designation of private land that cannot presently support the dusky gopher frog as unoccupied critical habitat and the agency's decision not to exclude areas from a critical habitat designation because of the economic impact of the designation, it should be mindful of the purpose of judicial review.

First, judicial review of government action exists to enforce the Constitution and laws. In *Marbury v. Madison*, 5 U.S. 137 (1803), the Court ruled that federal courts have the power to declare

unconstitutional acts by the Executive and the Legislature. "[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Marbury*, 5 U.S. at 180. In the more than 200 years since *Marbury*, judicial review has been "essential to enforcing the Constitution and to ensuring that no person, not even the president, is above the law." Erwin Chemerinsky, *Opinion, The Power of Judicial Review: Erwin Chemerinsky*, Los Angeles Daily News (May 3, 2017, 1:02 PM), https://www.dailynews.com/2017/05/03/the-power-of-judicial-review-erwin-chemerinsky/. Without the power of judges to enforce the Constitution, it "is no more than words on old parchment that is kept under glass." *Id.*

Second, judicial review serves as a necessary check on the exercise of power by the Executive and Legislative branches of government. "Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J. concurring). Hence, James Madison observed "in these explicit terms: 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.'" *Id.* (quoting The Federalist No. 47, p. 301 (C. Rossiter ed. 1961)). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton*, 524 U.S. at 450 (Kennedy, J. concurring).

Relative to "the growing power of the administrative state," *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., joined by Kennedy, J. and Alito, J., dissenting), the Judiciary's duty to review agency decision-making is therefore especially important. Agency decision-making of the type involved in the present case involves the exercise of legislative and executive powers by a single body. *See City of Arlington*, 569 U.S. at 1877-78. Mindful of *liberty*, this Court in reviewing the Service's decisions "should not defer to [the Service] until the [C]ourt decides, on its own, that the agency is entitled to deference." *Id.* at 1877.

Courts have already determined that critical habitat designations are subject to judicial review under section 704 of the Administrative Procedure Act. *E.g.*, *ALCOA v. Adm'r, Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir. 1999) ("The [APA] governs judicial review of administrative decisions involving the [ESA]."). And wisely so. Without judicial review, courts would be foreclosed from serving as a check on potentially arbitrary or capricious conduct by federal agencies.

Critical habitat designations have implications for "hundreds of thousands of rural citizens." Matthew Groban, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give a Hoot About the Public Interest It "Claims" To Protect?*, 22 Vill. Envtl. L.J. 259, 279 (2011). In California alone, the federal wildlife agencies have designated more than 20 million acres of land and waters as critical habitat. Br. of Amici Curiae Coalition, SLDMWA, and WGA in Support of Pet'rs Writ of Cert. Ex. 1, Aug. 11, 2017.

Judicial review provides an essential check on the Service's power and protects individual property rights and liberties. *See Sackett v. Envtl. Prot. Agency*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of [agency] employees."). However, without *effective* judicial review, separation of powers cannot operate as intended under the Constitution, and persons impacted by agencies' interpretation and application of federal statutes are denied the benefit of independent review.

B. THE EXPANSION OF THE *CHEVRON* DOCTRINE UNDERMINES JUDICIAL REVIEW OF AGENCY DECISION-MAKING

Since this Court's issuance of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "[b]y and large, the history of the *Chevron* doctrine has been one of triumphal expansion." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 838 (2001). *Chevron's* journey from a case regarding an arcane air quality rule to an eponymous doctrine ubiquitously applied as a pillar of administrative law is remarkable. The *Chevron* doctrine's expansion has had a tangible impact on the way in which courts review agency decisions.

Perhaps because *Chevron* was an environmental case, it took hold within the environmental law context first. *Id.* Through time the doctrine has "gradually displaced formulations about deference developed in other fields, including those with substantial bodies of

precedent that preexisted *Chevron* and deviated from it in important respects, such as labor law and tax law." *Id.* at 838-39 (citations omitted).

While the doctrine's history of application to different types of legal issues and agency interpretations (*Chevron's* "domain") has been uneven and complicated, overall, it is marked by a pattern of expansion. The *Chevron* doctrine is now, arguably, applicable to some informal agency interpretations that are not the product of a formal adjudication or notice-and-comment rulemaking, *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001) ("[A]s significant as notice-and-comment is in pointing to Chevron authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded."); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (noting that "the presence or absence of notice-and-comment rulemaking [was not] dispositive" in *Mead Corp.*, 533 U.S. at 218); to agencies' interpretations of their own authority or jurisdiction, *City of Arlington v. FCC*, 569 U.S. 290, 303 (2013) ("The U.S. Reports are shot through with applications of Chevron to agencies' constructions of the scope of their own jurisdiction."); and to agency interpretations that conflict with published judicial opinions, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

Chevron's incursion into a range of legal fields and issues is important because the deferential regime that courts employ in part determines whether and to what extent courts will engage in independent interpretation of the law. In 2017, Kent Barnett and Christopher J. Walker published an article that presents the findings of the largest empirical study of *Chevron* in the circuit courts. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1 (2017). Barnett and Walker attempted to capture all published decisions over an eleven-year period in which the circuit courts referred to *Chevron*, and from that pool of decisions, assembled a dataset of 1,327 decisions in which the circuit courts reviewed agency interpretation of statutes. *Id.* at 21-27. Barnett and Walker found that:

> the application of the Chevron framework seems to make a meaningful difference as to whether agencies prevail on the interpretive question. Indeed, there was nearly a twenty-four-percentage-point difference in win rates when the circuit courts applied Chevron deference (77.4%) than when they refused to apply it (53.6%). The agency was twice as likely (77.4% to 38.5%) to prevail if the court applied Chevron deference as opposed to reviewing the interpretation de novo and nearly three-fourths more likely (77.4% to 56.0%) to prevail under Chevron than Skidmore. In other words, agencies won more in the circuit courts when Chevron deference applied, at least when the court expressly considered whether to apply Chevron deference.

Id. at 30-31; *see also* Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale J. on Reg. 1, 31 (1998) (presenting the results of an empirical study finding that "courts resolving applications at [*Chevron*] step one upheld the agency interpretations only 42% of the time . . . and those resolving applications at step two upheld the agency view in 89% of the applications").

Barnett and Walker modestly conclude, "In sum, using agency-win rates as an admittedly less-than-perfect heuristic to assess the meaningfulness of deference regimes, as others before us have done, we see that *deference regimes appear to matter*." Barnett & Walker, *supra*, at 32 (emphasis added). However, as any party that has repeatedly confronted *Chevron* deference in attempts to obtain judicial relief knows, deference regimes not only appear to matter, but most certainly do matter. This case, *Weyerhaeuser Co. v. Fish and Wildlife Service, et al.*, is a prime example.

What if the Court were to pull in the reins on *Chevron* and allow courts to reclaim their rightful interpretive authority? Prior to joining the Court, Justice Gorsuch addressed just such a question:

> [W]hat would happen in a world without *Chevron*? If this goliath of modern administrative law were to fall? Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to

> exercise their independent judgment about what the law is. Of course, courts could and would consult agency views and apply the agency's interpretation when it accords with the best reading of a statute. But *de novo* judicial review of the law's meaning would limit the ability of an agency to alter and amend existing law. It would avoid the due process and equal protection problems of the kind documented in our decisions. It would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election. And an agency's recourse for a judicial declaration of the law's meaning that it dislikes would be precisely the recourse the Constitution prescribes — an appeal to higher judicial authority or a new law enacted consistent with bicameralism and presentment. We managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change — except perhaps the most important things.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring). *Chevron* should be set aside, or at minimum significantly modified. If the Court retains some aspect of *Chevron*, it should affirm Judge Silberman's observation that "*Chevron's* second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Global*

*Tel*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017) (Silberman, J., concurring).

II. THE REFUSAL OF THE JUDICIARY TO REVIEW AGENCY TECHNICAL DETERMINATIONS IS BASED ON AN OVER-EXPANSIVE READING OF *BALTIMORE GAS & ELECTRIC* AND IS IMPROPER

In addition to invoking *Chevron* to justify its holding that land that is not habitable by a species is "essential for the conservation of the species," the court of appeals invokes *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) for the proposition that when courts are reviewing agency scientific determinations, they must be at their most deferential. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 465 (5th Cir. 2016). Like *Chevron*, *Baltimore Gas & Electric* was an environmental case. It involved a challenge to a decision of the Nuclear Regulatory Commission (NRC) under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. In upholding the decision of the NRC that permanent storage of certain nuclear wastes would have no significant environmental impact, the Court expressly affirmed the NRC's assumption that there was zero chance that the nuclear waste would be released into the environment.

The Court explained:

> A reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific

> determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.

462 U.S. at 103.

While this Court has neither revisited nor even cited *Baltimore Gas & Electric* in the past quarter century, the case has greatly influenced lower courts. Travis O. Brandon, *Fearful Asymmetry: How the Absence of Public Participation in Section 7 of the ESA Can Make the "Best Available Science" Unavailable for Judicial Review*, 39 Harv. Envtl. L. Rev. 311, 343 (2015). The deference accorded to agency scientific determinations under *Baltimore Gas & Electric* has come to be known as super deference. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 Mich. L. Rev. 733 (2011).

Meazell offered a scathing critique of the doctrine of super deference built on *Baltimore Gas & Electric*.

> Super deference is not grounded in realistic notions of agency science; it may contribute to ossification and the science charade; and it appears to have a disparate impact on environmental law. Measured against broader administrative-law values, super deference also inhibits transparency; undermines deliberation; fails to accord with political accountability; and generally abdicates the courts' role in the constitutional scheme by encouraging outcome-oriented review.

Id. at 737-38 (footnotes omitted).

Traditional deference under the Administrative Procedure Act, 5 U.S.C. § 706(2), and the record review doctrine, which reserves to federal agencies the ability to determine the scope of the record on review, already stack the odds in favor of the federal government. In this context, as Meazell points out, the time-tested hard look doctrine[2] applied by the courts strikes a reasonable balance by promoting transparency, deliberation, and accountability, and situating the courts in their proper position as judicial watchdogs. Meazell, *supra*, at 737-38, 784. The alternative—application of super deference to agency scientific and technical determinations—is akin to "a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably." *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 69 (D.C. Cir. 1976), *cert. denied* 426 U.S. 941 (1976) (Leventhal, J., dissenting).

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[2] The doctrine was first applied in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) and *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971). This Court implicitly endorsed the hard look doctrine in *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983). *See* Merrick Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 543-549 (1985) (providing a thorough discussion of the *State Farm* decision as an endorsement of the hard look doctrine).

III. *TVA V. HILL* DOES NOT JUSTIFY READING THE ESA AS SUPPORTING WHATEVER INTERPRETATION MAXIMIZES SPECIES PROTECTION

The Court's first and probably most widely-known decision involving the ESA is *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (*TVA v. Hill*). In that case the Court held that ESA section 7 barred completion of the Tellico Dam, because the completed dam would likely cause the extinction of the snail darter fish. The Court found that the ESA was "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost," and that section 7 "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *TVA v. Hill*, 437 U.S. at 180, 184, 185. ESA section 7, the Court found, "admits of no exception," and hence completion of the dam was precluded, despite the millions of dollars already invested. *Id.* at 173.

This sweeping language in *TVA v. Hill* has led litigants, and sometimes courts, to call for the ESA's terms to mean whatever offers the greatest protection for listed species. That call will likely be repeated in this case. The Court's ESA jurisprudence since *TVA v. Hill* makes clear, however, that the ESA should not be read to override all other interests in the name of maximum species protection.

The Court has addressed the ESA in four cases since *TVA v. Hill*. The first, *Lujan v. Defenders of*

Wildlife, 504 U.S. 555 (1992), was decided on grounds of Article III standing, and hence did not delve into the ESA's substantive provisions. The second was *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). *Sweet Home* involved a regulation defining the term "take," and presented the issue whether take could include habitat modification that only indirectly injures a listed species. The Court held it may, and that a regulation so providing was permissible under the ESA. *Sweet Home*, 515 U.S. at 698. But in doing so the Court carefully defined limits on the reach of potential liability for take, explaining that to establish liability for illegal take requires meeting "ordinary requirements of proximate causation and foreseeability" and that the act involved must "actually kill[] or injure[]" particular members of the listed species. *Id.* at 700 n.13. The proof requirements set out in *Sweet Home* thus narrowed the potential for enforcement based on modification of habitat, granting some protection for landowners facing uncertainty over permissible uses of their property.

The third case was *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett* a unanimous Court held that the citizen suit provision of the ESA, 16 U.S.C. section 1540(g), allows any person to sue for violations of the ESA, including persons whose commercial, agricultural, recreational or other economic interests may be impaired by application of the ESA. *Bennett*, 520 U.S. at 176-77. That is, the Court declined to limit citizen suits to those persons seeking greater protection of listed species. For ESA-related claims brought under the Administrative Procedure Act, the Court found that economic interests are within the zone of interests protected by the ESA. For example, the

requirement that the agencies use the best scientific data available is intended "to ensure that the ESA not be implemented haphazardly, on the basis of speculation" and "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 176-77. Thus, *Bennett* makes clear that the ESA should be read and applied according to all its terms, including terms that temper or limit regulation intended to benefit listed species.

Finally, the Court addressed the ESA in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). In *Home Builders* the Court held that a regulation adopted by the Services properly limited section 7 consultation to discretionary agency actions. That is, federal agencies are not required to consult on actions that are mandated, that they lack discretion to avoid taking. *Home Builders*, 551 U.S. at 664-69. The Court held the Environmental Protection Agency therefore had no obligation to consult regarding its delegation of permitting authority under the Clean Water Act to the State of Arizona, where the provision of the Clean Water Act governing delegation did not allow for additional potential criteria arising from ESA consultation. *Id.* at 661-73. *Home Builders* teaches that while section 7 may bar federal agencies from carrying out discretionary actions, such as the action at issue in *TVA v. Hill*, section 7 does not apply to and hence does not bar agencies from fulfilling nondiscretionary duties. Once again, the Court recognized that the ESA applies within a framework of multiple objectives and interests, and that pursuit of protection of listed species does not always override other interests.

In sum, it is often argued that the sweeping language of *TVA v. Hill* justifies reading the ESA's provisions regarding designation of critical habitat broadly, so at to maximize protection for listed species. But this Court's ESA jurisprudence demonstrates that is not the correct approach. The ESA, like other statutes serving important purposes, must be reasonably construed in accordance with its terms. Like other statutes, it has limits, and requirements that are intended to balance achievement of its purposes with avoiding unnecessary or undesirable impacts to other interests. The present case offers the Court another opportunity to make that clear.

IV. AGENCY APPLICATION OF THE ESA WITHOUT THE BENEFIT OF EFFECTIVE JUDICIAL REVIEW CAN HAVE SIGNIFICANT CONSEQUENCES ON THE USE OF LAND AND WATER RESOURCES

Three aspects of the ESA make an expansive application of its provisions particularly problematic for private landowners and water users. First, a few may be asked to bear the cost of preserving species for the benefit of many. For example, the last landowner with habitat suitable for a listed species who seeks to develop her property may be constrained from doing so, because others have developed their properties sooner, and she owns what has become the last remaining habitat. Or, the water user whose diversion is subject to consultation under ESA section 7 may be required to leave water in the river to compensate for the effects of many other diversions that are not subject to such consultation. Second, the ESA is a federal law that directly regulates use of private land and water

resources. It thus can become a tool under federal law for requiring changes to or limits on use that the traditional regulators of land use and water rights, state and local governments, have decided not to impose. Third, for the most part the ESA lacks cost-benefit and cost-effectiveness standards that might otherwise shape regulatory implementation. The designation of critical habitat is one of the few areas where economic impacts come into play, but as the facts in this case illustrate, that consideration can be very limited in practice. These aspects of the ESA call for a careful review of its application. It is one thing for such burdens to be imposed by Congress; it is something else for such burdens to be imposed by agencies through an overly-expansive interpretation of the ESA's terms, or zealous, but unintelligent application of the act. *See Bennett*, 520 U.S. at 176-77.

Another feature of the ESA requiring careful judicial scrutiny arises from the mixed scientific and legal judgments it requires. To make a listing decision under section 4 of the ESA, for example, the Secretary of the Interior is required to identify any species "in danger of extinction throughout all or a significant portion of its range" based on threats such as loss of habitat, disease or predation, or overutilization for commercial purposes. 16 U.S.C. §§ 1531(6), 1533(a)(1). The Secretary must make this decision "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b). As another example, under section 7 of the ESA, each federal agency must insure that its actions will not jeopardize the continued existence of a listed species, again using the best scientific data available. 16 U.S.C. § 1536(a)(2). Such determinations require a mix of scientific and legal,

and perhaps policy, judgments. There can be a temptation on the part of the agencies and also the courts to characterize these determinations as scientific or technical in nature, to invoke super deference (discussed above) and insulate them from meaningful judicial review.

An example of judicial deference to an agency's application of the ESA, one that involved these *amici*, is found in *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014). The case involved a challenge to a biological opinion (BiOp) issued under ESA section 7 regarding the effects of federal Central Valley Project and California State Water Project operations on a listed fish, the delta smelt. While there are many causes for the delta smelt's decline, under ESA section 7, the focus of the BiOp is on the action involved. The Service found that proposed operations of the Central Valley Project and the State Water Project would jeopardize the fish, and specified a reasonable and prudent alternative to avoid jeopardy that resulted in substantial loss of water supply. The district court found that the BiOp included serious errors, and remanded it. *Delta Smelt Consol. Cases v. Salazar*, 760 F. Supp. 2d 855 (E.D. Cal. 2010). On appeal, the Ninth Circuit agreed the BiOp had significant flaws, explaining:

> the BiOp is a bit of a mess. And not just a little bit of a mess, but, at more than 400 pages, a big bit of a mess. And the FWS knew it. . . . The BiOp is a jumble of disjointed facts and analyses. . . . It is a ponderous, chaotic document, overwhelming in size, and without the kinds of signposts and roadmaps that even

> trained, intelligent readers need in order to follow the agency's reasoning.

San Luis & Delta-Mendota Water Authority, 747 F.3d at 604-06. But, applying the doctrine of super deference, the court found the BiOp was good enough to withstand judicial review, and reversed the district court. *Id.* at 606-27.

Under that deferential standard, a poorly explained and poorly supported agency action has been allowed to continue to diminish precious water supplies for much of California. The United States Bureau of Reclamation has estimated that on a long-term annual average, the BiOp, paired with a related salmonid biological opinion issued in 2009, will reduce Central Valley Project water deliveries by 335,000 acre-feet annually, and reduce State Water Project deliveries by 773,000 acre-feet annually. U.S. Bureau of Reclamation, *Coordinated Long-Term Operation of the Central Valley Project and State Water Project Final Environmental Impact Statement* 5-100-05 (2015). One million acre-feet of water is enough to supply approximately 2,500,000 of California's households for a year, or to irrigate approximately 325,000 acres of California's farmland for a year. William B. DeOreo, *California Single Family Water Use Efficiency Study* 26 (2011); Renée Johnson & Betsy A. Cody, *California Agricultural Production and Irrigated Water Use* 15 (2015). The BiOp's requirements intended to protect delta smelt have been in effect since 2008. Yet, since 2008, the delta smelt and salmonid species' relative abundance has reached new lows, calling into question the premises of the BiOp and the efficacy of its measures directed at water project operations. FMWT

Delta Smelt Annual Abundance Indices (all ages), 1967-2017, Cal. Dep't of Fish and Wildlife, http://www.dfg.ca.gov/delta/data/fmwt/Indices/sld002.asp; GrandTab 2018.04.09: California Central Valley Chinook Population Database Report, Cal. Dep't of Fish and Wildlife, https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=84381&inline.

CONCLUSION

How did we get to a place where federal agencies are allowed to designate land uninhabitable by a protected species as critical habitat for that species? The answer is, in part, that the court of appeals combined different conceptions of deference to agency conduct in implementing the ESA in a manner that made judicial review a charade. *Meaningful* judicial review of agency decisions is essential as a counterbalance to the Executive Branch. The expansion of the *Chevron* and *Baltimore Gas & Electric* doctrines and the misguided notion that the ESA is a statute subject to a different standard have left organizations and individuals across the country without the opportunity for effective judicial review of highly consequential agency decisions. We urge you to rule for Petitioner and in so doing adhere to Constitutional strictures by reinvigorating meaningful judicial review.

Respectfully submitted,

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No. 17-71

In The Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF DEFENDERS OF WILDLIFE, ANIMAL WELFARE INSTITUTE, HUMANE SOCIETY OF THE UNITED STATES, SIERRA CLUB, AND WILDEARTH GUARDIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[1]

Defenders of Wildlife, Animal Welfare Institute, Humane Society of the United States, Sierra Club, and Wildearth Guardians (*Amici*) are leading non-profit conservation organizations with longstanding interests in protecting wildlife, particularly endangered and threatened species, from habitat destruction and degradation and other threats. On behalf of their millions of members and supporters nationwide, *Amici* advocate for the effective implementation of the Endangered Species Act (ESA or Act) and seek to ensure that native species and the ecosystems on which they depend are preserved and maintained for present and future generations. *Amici*'s extensive experience with the ESA may assist the Court in understanding how the statute operates in practice to protect imperiled species and their habitats without imposing undue burdens on private landowners.

SUMMARY OF THE ARGUMENT

1. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). In enacting the ESA, Congress recognized that habitat protection is vital for

[1] No counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

recovering most imperiled species and established the purpose of the statute to "provide a means" for conservation of the ecosystems on which threatened and endangered species depend. Thus, in addition to prohibiting actions that directly kill or harm members of listed species, Congress ordered the Secretary of the Interior to identify the areas "essential to the conservation of the species" and to designate them as critical habitat "to the maximum extent prudent and determinable." Congress also required that all federal agencies ensure that their actions or authorizations do not cause the "destruction" or "adverse modification" of critical habitat. Designation of critical habitat—both occupied and unoccupied areas—is an indispensable part of Congress's comprehensive program to recover threatened and endangered species. Critical habitat designation provides important benefits for species and generally does so with minimal adverse impact on private lands. Indeed, recovery of species may well depend on designation of unoccupied critical habitat as there is no other mechanism in the ESA that adequately protects these areas.

2. The ESA does not contain, and this Court should not impose, a current "habitability" requirement on the designation of unoccupied critical habitat. This argument, which Petitioner advances for the first time in this Court, not only lacks textual support but makes little sense ecologically. Critical habitat can include historically crucial but now degraded habitat, as well as other areas that are essential to the conservation (*i.e.*, recovery) of the species. In upholding the U.S.

Fish and Wildlife Service's (Service)[2] designation of critical habitat for the dusky gopher frog, the Fifth Circuit did not expand the reach of the ESA; it ruled in accordance with the Act's plain language and conservation purpose and appropriately deferred to the Service's scientific findings.

3. Petitioner's attempt to invoke the doctrine of constitutional avoidance is unfounded. This case turns on a narrow issue of statutory interpretation and is not a necessary or appropriate vehicle for broad pronouncements on constitutional questions or the balance of state and federal powers. Nonetheless, the designation of critical habitat for the dusky gopher frog was a valid exercise of federal power. Accordingly, this Court should affirm the Fifth Circuit's decision.

ARGUMENT

The Endangered Species Act has been remarkably successful in preventing the extinction of species. Only one percent of the more than 1,800 species listed in the United States as endangered or threatened have been declared extinct after receiving the protections of the Act and many species are on the path to recovery. U.S.

[2] The Department of the Interior's U.S. Fish and Wildlife Service administers the Act for terrestrial and freshwater species while the Department of Commerce's National Marine Fisheries Service administers the Act for marine species. The critical habitat provisions apply to both agencies and we therefore use Service or Services throughout this brief to refer to their collective obligations under the Act.

Fish & Wildlife Serv., Delisted Species, https://ecos.fws.gov/ecp0/reports/delisting-report (last visited July 2, 2018); Daniel M. Evans et al., *Species Recovery in the United States: Increasing the Effectiveness of the Endangered Species Act*, Issues in Ecology, Winter 2016, at 1. But despite significant efforts to prevent extinction, the loss of biodiversity, driven largely by habitat degradation and destruction, remains a rapidly growing crisis. *See, e.g.*, Stuart L. Pimm et al., *The Biodiversity of Species and Their Rates of Extinction, Distribution, and Protection*, 344 Science 987 (2014); David Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 Am. Inst. Bio. Sciences 607 (1998); National Research Council, *Science and the Endangered Species Act* 72 (1995), https://www.nap.edu/read/4978/chapter/6#72 ("[T]here is no disagreement in the ecological literature about one fundamental relationship: sufficient loss of habitat will lead to species extinction."). Scientists estimate that by 2050, 10 percent of all terrestrial species will be "committed to extinction." Elizabeth Kolbert, *The Sixth Extinction: An Unnatural History* 167–68 (2014); *see also* Daniel A. Farber, *Separated at Birth? Addressing the Twin Crises of Biodiversity and Climate Change*, 42 Ecology L.Q. 841, 846 (2015) (noting that climate change will exacerbate biodiversity loss).

Amici submit this brief to underscore the vital role that designation of critical habitat plays in the ESA's comprehensive scheme to protect threatened and endangered species and the ecosystems on which they depend. Accordingly, this brief will focus on the benefits

of critical habitat for species and the narrow question of statutory interpretation that Petitioner presents to this Court: whether the ESA requires critical habitat to be habitable by the species at the time of designation. *Amici* urge the Court not to graft onto the ESA a requirement of current habitability for unoccupied areas. This extra-statutory requirement is fundamentally inconsistent with Congress's decision to allow for the designation of unoccupied areas that are biologically "essential" for species conservation. Such a rule would undermine the conservation value of critical habitat and make species recovery—the ESA's ultimate goal—less likely.

Beyond this issue of statutory construction, which Petitioner raises for the first time in this Court, Petitioner's challenge amounts to no more than a garden-variety disagreement with the views of an expert agency entrusted by Congress to perform a highly technical task. The Service's designation of Unit 1 as dusky gopher frog critical habitat was based on a thorough review of intact and restorable habitat areas. The Service designated this unoccupied critical habitat only after independent peer reviewers determined that existing occupied habitat was not sufficient for recovery and that the area contained unique and irreplaceable features essential to the conservation of the species. On such ecological questions, including what specific habitat is essential for the frog's recovery, this Court has repeatedly instructed that courts owe the Service a high level of deference. No persuasive, let alone

compelling basis exists for upsetting the Service's expert judgment here.

This brief will not address whether the Service's decision not to exclude areas from critical habitat is separately reviewable from the designation itself. Our focus here is on the proper statutory interpretation of "unoccupied critical habitat" and the deference due the Service's scientifically-grounded determinations.

I. Critical habitat is an integral part of the ESA's comprehensive program to conserve imperiled species

A. Congress designed the ESA to address the threats of habitat loss and degradation

When Congress passed the ESA in 1973 it was acutely aware that stemming the loss of biodiversity required more than protecting individual animals and plants: it also required protecting habitat from destruction or adverse modification. Of the many threats to America's wildlife heritage, Congress recognized that the "most significant has proven also to be the most difficult to control: the destruction of critical habitat." H.R. Rep. No. 93-412, at 4 (1973); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. at 179 ("Congress started from the finding that '[t]he two major causes of extinction are hunting and destruction of natural habitat.' Of these twin threats, Congress was informed that the greatest was destruction of natural habitats.")

(quoting S. Rep. No. 93-307, at 2 (1973) *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2990).[3]

In the 1978 amendments to the ESA, Congress reemphasized that "[t]he loss of habitat for many species is universally cited as the major cause for the extinction of species worldwide." H.R. Rep. No. 95-1625, at 5 (1978). Indeed, in the lead-up to those amendments, Congress specifically stated that "if the protection of endangered and threatened species depends in large measure on the preservation of the species' habitat, then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat." H.R. Rep. No. 94-887, at 3 (1976).

To that end, the ESA's purpose is not only to address actions directed at species themselves—such as hunting and trade—but also to "provide a means whereby the *ecosystems* upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b) (emphasis added). Conservation is statutorily defined as "the use of all methods and

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[3] The legislative history demonstrates that Congress understood this relationship between species protection and habitat loss. *See, e.g.*, 119 Cong. Rec. 30,528 (1973) (statement of Rep. Lehman) ("The new law recognizes that the greatest threat to endangered animals has been man's destruction of their habitat."); *see also* 119 Cong. Rec. 30,162 (1973) (statement of Rep. Sullivan) ("For the most part, the principal threat to animals stems from the destruction of their habitat."). After the 1978 amendments, one senator even said, "the designation of critical habitat is more important than the designation of an endangered species itself." 124 Cong. Rec. S21,575 (daily ed. July 19, 1978) (statement of Sen. Garn).

procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* § 1532(3). This conservation mandate covers the Act from nose to tail. As this Court has recognized, the "plain intent of Congress" in enacting the ESA "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Tenn. Valley Auth.*, 437 U.S. at 184.

The ESA establishes a framework for the conservation of imperiled species, with specific management actions left to the scientific judgment of the appropriate Service. First, the Service determines whether a species warrants listing as "threatened" or "endangered." 16 U.S.C. § 1533(a)(1). In making this determination, the first factor the Service considers is "the present or threatened destruction, modification, or curtailment of its habitat or range." *Id.* § 1533(a)(1)(A). Consistent with Congress's emphasis on habitat preservation, the Service must also at the time of listing and "to the maximum extent prudent and determinable" designate "any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A), (a)(3)(A)(i).

The ESA recognizes that critical habitat can be occupied or unoccupied by the species at the time of listing and provides separate definitions for each. Occupied critical habitat is defined as "the specific areas within the geographical area occupied by the species,

at the time it is listed . . . *on which are found those physical or biological features (I) essential to the conservation of the species* and (II) which may require special management consideration or protection." *Id.* § 1532(5)(A)(i) (emphasis added). By contrast, the definition of unoccupied critical habitat includes the "specific areas outside the geographical area occupied by the species at the time it is listed . . . *upon a determination by the Secretary that such areas are essential for the conservation of the species.*" *Id.* § 1532(5)(A)(ii) (emphasis added). Notably, Congress's definition of unoccupied critical habitat specifically *omits* the requirement that such habitat possess the "physical or biological features" essential to species conservation and, instead, requires only that the Service make a "determination . . . that such areas are essential for the conservation [i.e., recovery] of the species." *Compare* 16 U.S.C. § 1532(5)(A)(i) *with* 16 U.S.C. § 1532(5)(A)(ii). For both occupied and unoccupied critical habitat, the Service must make a species-specific determination "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat." *Id.* § 1533(b)(2).

Once a species is listed, a series of substantive and procedural requirements attach. While section 9 prohibits "take" of endangered species without prior authorization, *id.* § 1538(a)(1)(B),[4] section 7(a)(1) imposes

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[4] Section 9's prohibitions apply only to endangered species but may be extended in whole or in part to threatened species

on federal agencies a substantive obligation to promote the conservation of listed species. *Id.* § 1536(a)(1). Moreover, section 7(a)(2) obligates federal agencies to consult with the Service whenever they act, authorize, or fund a project that may affect a listed species or its designated critical habitat. *Id.* § 1536(a)(2). Through consultation, federal agencies must ensure that their actions will not "jeopardize the continued existence" of a listed species or "result in the destruction or adverse modification" of critical habitat. *Id.* § 1536(a)(2). This consultation process is designed to lessen the impact of federal or federally-permitted activities on species and their critical habitats. In practice, consultation has allowed most development projects to proceed with no more than minor modifications.

Section 7 is particularly important for unoccupied critical habitat because while such habitat may in fact be indispensable to the species' conservation, there is no other statutory mechanism for protecting these areas. The Act's take prohibition protects species from, among other things, "harm," *id.* § 1538, but the regulatory definition of "harm" only applies to habitat modification that actually kills or injures wildlife which is unlikely to happen if the listed species is not present. 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) (requiring a reasonable likelihood of harm to individual animals for habitat modification to constitute take under the ESA).

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pursuant to regulation. 16 U.S.C. § 1533(d). The U.S. Fish & Wildlife Service has enacted a blanket rule extending section 9 prohibitions to threatened species. 50 C.F.R. § 17.31(a).

By contrast, the proscription on federal agency actions that may destroy or adversely modify critical habitat protects designated areas regardless of whether an action will directly harm individual animals. Thus, critical habitat designation provides the only statutory protection for areas that are unoccupied but necessary for the expansion and recovery of the species.[5]

Congress's determination that unoccupied habitat may nonetheless be essential to conservation, even if it is not habitable when designation occurs, makes biological and practical sense. When a species with a previously larger range has been reduced to a small patch of presently suitable habitat by the "destruction [or] modification . . . of its habitat," 16 U.S.C. § 1533(a)(1)(A), recovery may necessarily require the protection of both the dwindling areas where the species still occurs and other areas needed for its conservation, including historically occupied areas capable of being restored and recolonized. For such species, designation of unoccupied critical habitat plays an indispensable role in their recovery.

B. Designating critical habitat promotes species recovery

Critical habitat's operative weight stems from section 7's consultation requirement. 16 U.S.C.

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[5] Even that protection is limited because it only extends to discretionary actions authorized, funded, or carried out by federal agencies. *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

§ 1536(a)(2). For projects on federal lands or that require federal funding, approval, or implementation, section 7 provides important substantive and procedural checks on actions affecting habitat that is essential to a species' conservation. But designation also generates valuable information that federal, state, local, and private landowners can use to help conserve species. These benefits may be just as important as the action-forcing provisions described above.

When critical habitat is designated on federal lands, it can help prioritize section 7(a)(1) conservation efforts. Under section 7(a)(1), all federal agencies must "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). This obligation covers everything from recovery planning to direct restoration of habitat on federal lands. Take, for example, the U.S. Forest Service's efforts to restore degraded unoccupied critical habitat for the New Mexico meadow jumping mouse. Unoccupied critical habitat for this species was designated along riparian tracts degraded by years of overgrazing. 81 Fed. Reg. 14,264, 14,267 (Mar. 16, 2016). Following designation, the Forest Service engaged with conservation partners and local ranchers to install a series of cattle exclusion fences and alternative water sources that allowed these degraded areas to return to their natural condition and once again host the mouse. U.S. Forest Service, *New Mexico Meadow Jumping Mouse Habitat Improvement Projects on the*

Agua Chiquita Grazing Allotment, https://www.fs.usda.gov/project/?project=51273 (last visited July 2, 2018). Without critical habitat designation, it is unlikely that these areas would have received the same priority.

Critical habitat designation also provides broad notice to both federal agencies and the public of the location and importance of the particular areas that are essential to species recovery. Listing the species alone may not adequately convey this information. Federal agencies and private landowners alike may be otherwise unaware of the importance of an area to a species' recovery because even the most diligent survey of the area may not reveal the listed species or the physical or biological characteristics associated with its survival. Jack McDonald, *Critical Habitat Designation Under the Endangered Species Act: A Road to Recovery?*, 28 Envtl. L. 671, 688-91 (1998) (discussing the notice benefits of designation). This is especially true for migratory species and those that depend on ephemeral habitats.

A prime example of this occurs in the glacial outwash prairies of western Washington, where four listed subspecies of Mazama pocket gopher are found. 79 Fed. Reg. 19,760, 19,772 (Apr. 9, 2014). These gophers spend most of their lives underground, which makes observation extremely difficult. *Id.* That difficulty is compounded by the species' tendency to shift its occupied range from generation to generation. 79 Fed. Reg. 19,712, 19,715 (Apr. 9, 2014) (designating critical habitat) ("movements result in apparent changes of the occupancy status of a specific site over time, as juveniles

disperse and colonize new sites, or conversely, as territorial individuals die and specific sites become unoccupied"). If unoccupied areas were not protected by critical habitat designation, the species' protected habitat would be limited to the occupied range at the time of listing, and subsequent generations would not have sufficient protected habitat in which to disperse. Designation of critical habitat allows the Service to identify areas that are presently unoccupied or otherwise appear to lack conservation value and highlights their importance to the species.

Additionally, the information developed during the designation process can help focus the efforts of conservationists, states, and private landowners when developing habitat conservation plans. Even where no federal action is involved, these actors may elect to tailor their activities to avoid negatively affecting a sensitive area. *See, e.g.*, Dashiell Farewell, *Revitalizing Critical Habitat: The Ninth Circuit's Pro-Efficiency Approach*, 46 Envtl. L. 653, 663 (2016) ("With more parties on notice the more likely it is that habitat will receive the consideration and protection it deserves.").

Designation can also help maximize the conservation value of land acquisition by allowing parties to target those areas that would most benefit a species. For example, after conservation groups expressed concern about development near one of the dusky gopher frog's last known breeding ponds, the real estate developers agreed to a land purchase that protected 170 acres of critical habitat for the species. *See* Press Release, Ctr. for Biological Diversity, *Land Purchase*

Protects Essential Mississippi Habitat for Endangered Dusky Gopher Frog (May 14, 2015), https://www.biologicaldiversity.org/news/press_releases/2015/dusky-gopher-frog-05-14-2015.html.

Perhaps most importantly, designating critical habitat ensures that adequate focus is placed on species recovery and not just survival. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (requiring the Service to provide for species recovery, not just survival, in designating critical habitat). While other provisions of the Act protect species from direct harm, *see* 16 U.S.C. §§ 1536, 1538, or authorize the discretionary acquisition of lands, *see id.* § 1534, only critical habitat mandates that the Service determine precisely which areas are essential to recovery. *Id.* §§ 1532(5), 1533(a)(3)(B). In fact, of all the provisions in the ESA, critical habitat designation may contribute the most to recovery because it is not limited just to those areas where a species lives at any given moment. This is particularly true for species that have been driven to the point of extinction by habitat loss.

Designation of unoccupied critical habitat is especially important for areas that were historically occupied or are scientifically determined to be essential for expansion of a species' range in the future. Michael J. Bean & Melanie J. Rowland, *The Evolution of National Wildlife Law* 261–62 (3d ed. 1997) ("Unoccupied critical habitat is habitat, the protection of which is needed to improve the species' status quo; that is, it is primarily needed for the recovery of the species."). If the goal

is to recover species to a point where the Act's protections are no longer needed, then logically "it will be necessary to protect some of [a species'] former habitat as well as that which it currently occupies." Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 Buff. L. Rev. 1095, 1105 (2010).

Critical habitat's contribution to recovery will, of course, vary on a species-by-species basis, but research shows a correlation between critical habitat designation and positive trends in recovery status. *See* Martin F.J. Taylor, *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BioScience 360, 363 (2005). Other studies have shown that designation of critical habitat is "correlated with increased effort to protect species." Amy N. Hagen & Karen E. Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*, 20 Conservation Biology 399, 400 (2006). Indeed, species with critical habitat are also more likely to have recovery plans that are up to date and being implemented than species without critical habitat. *Id.* ("Critical habitat designation therefore helps populations improve, increases knowledge about trends, and contributes to recovery goals being met."). Critical habitat is thus an important tool for recovering species, the ultimate goal of the ESA. 16 U.S.C. §§ 1531(b) (purposes), 1532(3) (definitions of "conserve," "conserving," and "conservation").

C. Petitioner vastly overstates the economic impacts of critical habitat designation

Contrary to the alarmist rhetoric adopted by Petitioner and supporting *amici*, critical habitat serves a vital function in the ESA's conservation scheme without imposing an undue burden on economic activity. Designating critical habitat does not convert an area into a park or preserve, nor does it require that humans cease all activity on the land. The consultation requirement that attaches to critical habitat is directed solely at federal agency actions. 16 U.S.C. § 1536(a)(2). Thus, so long as no federal permit is required, and no federal funding needed, designating critical habitat on private land has no effect on the owner's use of the property.

Even when a federal permit is required, empirical evidence demonstrates that section 7 consultation almost never stops a proposed development in its tracks. After examining every consultation recorded by the U.S. Fish and Wildlife Service between January 2008 and April 2015, Malcom and Li determined that "no project has been stopped or extensively altered as a result of FWS concluding either jeopardy or destruction/adverse modification of critical habitat." Jacob Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, 112 PNAS 15844, 15845 (2015) (reviewing all 88,920 USFWS consultations from January 2008 through April 2015). Most consultations during this period were informal, but of the 6,829 formal consultations, only two resulted in a jeopardy

determination. *Id.* In only one of those two cases did the Service find that the proposed action would destroy or adversely modify critical habitat. *Id.* Despite that finding, the proposed action was approved with the adoption of reasonable and prudent alternatives that minimized impacts to habitat. *Id.*[6] As this research shows, section 7 does not, in theory or practice, hamstring all private development. Rather it advances the ESA's recovery goals by striking a science-driven balance between conservation and economic activity.

On the record before the Court, Petitioner has not sought, let alone been denied, federal permits to develop Unit 1, and it is undisputed that the critical habitat designation does not impede current silviculture activities on the site. Pet. Br. at 42 (noting that they could "forego [Clean Water Act] permitting or other federal involvement and continue to operate Unit 1 as a commercial forest"). Even if Petitioner must ultimately seek federal permits for the proposed development,[7] it is unlikely that a section 7 consultation would scuttle their plans. It is entirely possible that

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[6] While several earlier studies found higher rates of jeopardy and adverse modification findings, such findings were still extremely rare. *See, e.g.*, Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141 (2012) (from 2005 to 2009, 7.2% of consultations related to U.S. Fish & Wildlife Service administered fish species resulted in jeopardy); H.R. Rep. No. 97-567, at 13 (1982) (House Report on 1982 ESA amendments noting that only 1.8% of consultations resulted in jeopardy and that of those only two projects were ultimately halted).

[7] Here, ESA regulations are only implicated if there is a federal nexus, like a section 404 permit under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (1972).

residential development of the area could proceed along with a habitat conservation plan to preserve the rare ponds on the property and restore upland features that are optimal for the frog's lifecycle. Alternatively, other private actors could purchase the property for conservation purposes.[8]

We cannot stress enough: designating this area as critical habitat is only the first step in a process to determine how it will contribute to the frog's recovery. In contrast with the lack of evidence supporting Petitioner's speculative injuries, record evidence shows that Unit 1 is essential to the conservation of the dusky gopher frog because it is the last remaining area of the species' historic range that could still support the species in the future. 77 Fed. Reg. 35,118, 35,124 (June 12, 2012) ("the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog"). Moreover, the breeding ponds cannot be replaced or restored once destroyed. *Id.* at 35,123 (noting

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[8] Judge Owen's dissenting opinion makes much of Petitioner's alleged opposition to restoration efforts on the property and focuses on the remote likelihood that restoration would occur. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 487 (5th Cir. 2016) (Judge Owen dissenting). But the current willingness of any existing landowner to conserve or improve a property does not foreclose the Service from determining that a particular area is essential to the species' conservation—a determination that, under the statute, turns on biological facts rather than landowner preference. The point of designating critical habitat is to identify and provide notice of the areas scientists believe are essential to a species' recovery before options for conservation are foreclosed.

that years of effort to restore or recreate habitat of similar quality elsewhere have failed). Thus, Unit 1 provides the best chance of increasing the representation, resiliency, and redundancy that are essential to the recovery of the dusky gopher frog.[9] If the Service cannot designate the last places on earth that the frog could potentially breed as critical habitat, there is little hope for the species.

II. Imposing a temporal habitability requirement on unoccupied critical habitat is neither mandated by the ESA's plain language nor reconcilable with the Act's conservation purpose

A. The ESA does not require that critical habitat be habitable at the time of designation

Petitioner and their *amici* have seized on an extraordinarily broad dissent from the Fifth Circuit's denial of rehearing en banc to assert a new argument that they themselves failed to present to either the district court or the appellate panel below. Pet. Br. at 22–32; Markle Br. in Support of Pet. at 26–28. This argument, that unoccupied critical habitat must be habitable at the time of designation, conflicts with the ESA's plain language and would significantly diminish, if not eviscerate, the value of unoccupied critical habitat for the conservation of habitat-limited species.

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[9] Evans, *supra*, at 6, 22 (describing the "3R's" of species recovery).

The ESA defines unoccupied critical habitat as the "specific areas" that the Service determines to be "essential for the conservation" of the species. 16 U.S.C. § 1532(5)(A)(ii). This definition focuses on whether an area is essential for conservation, *i.e.*, recovery, not whether it could, as is, support the species. A requirement that critical habitat must be immediately occupiable at the time of designation has no basis in the statutory language and would foreclose designation of restorable areas, areas that shift into and out of habitability, and areas that the Service has determined to be essential for species conservation because they provide the source of ecological benefits for occupied portions of the species' range.

Petitioner's effort to read a present habitability requirement into the statute is problematic in many respects. Most significantly, Congress did not create such a requirement. In fact, it did the opposite. Again, the statute defines occupied critical habitat as areas on which "*are found* those physical or biological features" that are "essential to the conservation of the species." *Id.* § 1532(5)(a)(i) (emphasis added). In the very next subsection, Congress omitted any such present tense requirement for unoccupied critical habitat, and instead required only a "determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). It is axiomatic that Congress acts intentionally when it "includes particular language in one section of a statute but omits it in another section of the same Act." *Dean v. United States*, 556 U.S. 568, 573 (2009). Applying that principle here

leads to the inescapable conclusion that Congress did not require that unoccupied critical habitat must be habitable by the species at the time of designation.

To avoid this straightforward reading of the statute, Petitioner relies heavily on a dictionary definition of "habitat." Pet. Br. at 23. But that definition gets Petitioner nowhere. Indeed, it circumvents another cardinal rule of statutory construction: dictionary definitions only come into play when Congress itself has not defined the term at issue. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."). Here, Congress defined unoccupied critical habitat in a manner that is irreconcilable with Petitioner's interpretation. In the "Definition" section of the ESA, Congress established what unoccupied critical habitat means. That definition does not support any requirement that the species must be able to exist in the "area" in question at the moment of designation.

Even if Congress had not already defined the relevant term, Petitioner's argument would still fail. Petitioner defines habitat as "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features . . . naturally or normally preferred by a biological species." Pet. Br. at 23 (citing Habitat, *Webster's Third New Intl. Dictionary* (1976)). To Petitioner, if a species cannot currently live on a site, then it does not "naturally" live there, and that area cannot qualify as habitat. But such a reading fails to properly examine what

it means for a thing to be "natural." "Natural" has many definitions, among them "growing without human care," "not cultivated," and "closely resembling an original: true to nature." Natural, *Webster's Third New Intl. Dictionary* (1976). This implies a state prior to significant human disturbance. When understood properly, what "*naturally* lives and grows" on Unit 1 are not the loblolly pines that Petitioner cultivates but the longleaf pine forests that could provide "food, shelter and protection" for the frog, 77 Fed. Reg. at 35,131. The frog, after all, naturally lived there until at least 1965. *Id.* at 35,133.

This is not to say that critical habitat requires restoring all designated areas to pre-settlement conditions. It is only to say that restricting critical habitat to unaltered, move-in ready parcels is at odds with not only Congress' chosen definition but the very purpose of the statute itself. There is simply no reasonable basis for construing the meaning of "habitat" so narrowly as to exclude, for example, historically occupied habitat that has become degraded but is nonetheless vital for species recovery efforts.

B. A temporal habitability requirement would undermine the conservation value of critical habitat

Petitioner's proposed extra-textual requirement ignores the reality of habitat modification, the very force that has driven many species to the point of

extinction and which Congress sought to address by passing the ESA. 16 U.S.C. § 1531(b). For many species, recovery requires protecting more than limited parcels of pristine habitat. It requires protecting remnants of degraded lands that are necessary to the species' conservation (*i.e.*, recovery). That is why Congress left it to the Service to ascertain which "specific areas" of unoccupied habitat are "essential for the conservation" of species that have been listed as endangered or threatened. Determining which lands are essential to fulfilling the ESA's recovery goals is a question for science, not *Webster's* dictionary.

By Petitioner's standard, currently unoccupied habitats that could be rendered suitable for occupation with even minor restoration efforts could never qualify for designation. This would be the case on federal lands, leaving agencies without crucial information to inform their 7(a)(1) conservation duty to promote the recovery of species like the New Mexico meadow jumping mouse, *see supra* Section I.B., as well as on private lands where landowners may be willing to help restore critical habitat through voluntary conservation efforts. *See Rangewide Conservation Plan for Longleaf Pine*, America's Longleaf Restoration Initiative (2009), http://americaslongleaf.org/media/86/conservation_plan.pdf (describing a plan to restore 8 million acres of longleaf pine forest on private land by 2025).

A current habitability requirement could also preclude the Service from designating dynamic habitats that cycle in and out of habitability. Some species require transitory or ephemeral habitats that may go

long periods without habitation. Many migratory shorebirds, for example, rely on intertidal habitats that are constantly changing and may be unsuitable from one year to the next. *See, e.g.*, Revised Designation of Critical Habitat for the Wintering Population of the Piping Plover (*Charadrius melodus*) in North Carolina, 73 Fed. Reg. 62,816, 62,818 (Oct. 21, 2008) (noting that "designating specific locations of critical habitat for the wintering piping plovers is difficult because the coastal areas they use are constantly changing due to storm surges, flood events, and other natural geo-physical alterations of beaches and shoreline"). Similarly, vernal pool species depend on ephemeral ponds that may go long periods without exhibiting the characteristics necessary for the species to thrive. Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 70 Fed. Reg. 46,924, 46,925 (Aug. 11, 2005) (noting that "the duration of ponding of vernal pools also varies, and in certain years some pools may not fill at all").

Just as harmful, Petitioner's reading would foreclose the possibility of designating areas that are not themselves habitable but which provide the physical or biological features that are essential to the survival of the species in occupied areas. Take, for example, the upstream reaches of the Big Tujunga Creek that provide stream and sediment flows necessary for the survival of the Santa Ana sucker in downstream occupied areas, *see* 75 Fed. Reg. 77,961, 77,973 (Dec. 14, 2010), or the sandy desert north of Ramon Road in Riverside

County, California that provides the source of windblown sand essential to the conservation of the Coachella Valley fringe-toed lizard in its range to the south, *see* 45 Fed. Reg. 63,812, 63,818 (Sep. 25, 1980). Under Petitioner's reading of the statute neither area could be designated because they were not suitable for occupation by the species at the time of designation.[10]

A current habitability requirement would put species like these at risk of extinction. In her dissent from denial of rehearing en banc, Judge Jones dismissed this concern as a mere "consequence of a more precise textual interpretation" but the Fifth Circuit panel ruling is far more faithful to the precise language used by Congress to define unoccupied critical habitat. *See supra* Section II.A. Likewise, the Ninth Circuit expressly rejected the argument that unoccupied but essential upstream areas should be excluded from the Santa Ana sucker designation because these areas were not occupied (or occupiable) habitat. As the court held,

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[10] Protection of unoccupied areas like these is not, as Judge Jones suggests, assured by section 7(a)(2)'s consultation requirement. While an action "does not have to occur on designated critical habitat to trigger section 7 consultation," *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 645 (5th Cir. 2017) (Judge Jones dissenting), where no critical habitat is designated, the presence of the species is typically what triggers consultation. *See* U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook at 3-11, https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf ("A biological assessment is required if listed species or critical habitat may be present in the action area.") (last visited July 2, 2018).

"[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as habitable." *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015). Again, essentiality, not present habitability, is what is required by the plain terms of the Act.

Neither Petitioner nor the dissenting judges articulate when, if ever, unoccupied critical habitat would be designated under their approach. Their counterintuitive and extra-textual approach would foreclose designation in numerous instances where areas are essential to species' conservation. Such a result is not consistent with the plain language and purpose of the ESA.

C. The Fifth Circuit's ruling did not "vastly expand the ESA"

In upholding the Service's determination that Unit 1 is essential to the conservation of the dusky gopher frog, the Fifth Circuit did not "vastly expand the ESA," Pet. Br. at 35, nor did the court render unoccupied habitat "easier to designate" than occupied habitat. *Cf. Markle Interests, L.L.C.*, 848 F.3d at 646 (Judge Jones dissenting). As discussed above, the text of the statute provides clear limits on the Service's authority to designate critical habitat. Before designating unoccupied areas, the Service must determine, on the basis of the best scientific data available, that a specific area is in fact "*essential* for the conservation of the species,"

16 U.S.C. § 1532(5)(A) (emphasis added). Petitioner and their *amici* unduly minimize this statutory requirement.

Judge Owen's panel dissent turns to the dictionary definition of "essential" to argue that an area that does not *presently* support a species' population (and which could require some degree of restoration to do so) cannot possibly be essential. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 483 (5th Cir. 2016) (Judge Owen dissenting). But this argument is unavailing. Black's Law Dictionary defines "essential" as "1. Of, relating to, or involving the essence or intrinsic nature of something. 2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Essential, *Black's Law Dictionary* (10th ed. 2014). While Judge Owen emphasizes that Unit 1 "is not 'actual[ly]' playing any part in the conservation of the endangered frog species," 827 F.3d at 483 (quoting *Black's*), this focus on the *present* value of habitat misses an important textual nuance.

The ESA's definition of "conservation" requires consideration *both* of a species' current survival needs and what is necessary for its recovery. 16 U.S.C. § 1532(3); *see also Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441–42 (5th Cir. 2001) ("'Conservation' is a much broader concept than mere survival."). The purpose of the ESA, after all, is to recover species to the point that the Act's protections are no longer necessary. 16 U.S.C. § 1532(3). An area that is presently unoccupied by a species may or may not provide a current benefit to the species. But it may

nonetheless be "of the utmost importance" and "essential to the conservation" of the species now and in the future. *Id.* § 1532(5).

As this case illustrates, the Service must find, after taking into account economic and other factors, that the best available scientific data supports the proposition that a presently unoccupied area is "essential for the conservation of a species." 16 U.S.C. § 1533(b)(2). Here, the Service designated Unit 1 as unoccupied critical habitat only after making a scientific determination that existing occupied critical habitat was insufficient to conserve the frog. The Service's original proposal only included occupied sites within Mississippi. *See* 75 Fed. Reg. 31,387, 31,395 (proposed June 3, 2010). But scientific peer reviewers of the proposed rule "were united in their assessment that this proposal was inadequate for the conservation of the dusky gopher frog." 77 Fed. Reg. at 35,123–24. Before designating Unit 1, the Service surveyed recorded sightings of the frog throughout its historic range and followed up on those leads with detailed aerial and on-the-ground surveys of potential remnant habitat. *Id.* at 35,133 (noting that the five ponds on Unit 1 were of "remarkable quality"). It also ruled out many other areas in both Alabama and Louisiana that lacked the breeding ponds that are so important to the frog's lifecycle. *Id.* Finally, the Service weighed the economic burden of designating Unit 1 against the conservation benefit from such action and determined that it was not appropriate to exclude these tracts. *Id.* at 35,140–41.

There is simply no substance to the notion that the Fifth Circuit's decision expanded the ESA by making it easier to designate unoccupied areas than occupied ones.[11] Congress adopted the definition of critical habitat and elected, for reasons that make perfect sense, not to require that unoccupied areas contain the "physical or biological features essential to the conservation of the species." Congress knew how to articulate a standard requiring the identification of specific features; it did so for occupied areas. But it chose different criteria for designating unoccupied critical habitat. A court cannot contradict the statute's plain language simply because it believes that unoccupied areas should be more difficult to designate than occupied areas for policy reasons that are nowhere to be found in the statute itself.

As the Fifth Circuit explained: "The Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the

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[11] Implicit in the arguments of Petitioner and their supporting *amici* is the notion that the Service could be over-designating unoccupied areas. This fear is unfounded. As an empirical matter, the Service rarely designates unoccupied critical habitat. Abbey E. Camaclang et al., *Current Practices in the Identification of Critical Habitat for Threatened Species*, 29 Conservation Biology 482, 482–92 (2014) ("In addition, unoccupied habitat was included as part of critical habitat for less than one third of the species we considered [from 2003 to 2012]."); *see also* Stephanie Brauer, Note, *Arizona Cattle Growers' Pyrrhic Victory for Critical Habitat*, 38 Ecology L.Q. 369, 379 (2011) ("Despite its importance, unoccupied habitat constitutes 'a relatively small amount of habitat designated as critical habitat.'").

designation could not stand." *Markle Interests, L.L.C.*, 827 F.3d at 472. The Service's science-based determination that Unit 1 is essential for the conservation of the dusky gopher frog warrants judicial deference. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("when examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential").

III. The Fifth Circuit's ruling neither impinges on the rights of states nor raises constitutional questions

Although this Court granted certiorari on only narrow issues of statutory interpretation, Petitioner and their supporting *amici* seek to import into the case issues of states' rights and constitutional concerns through the doctrine of constitutional avoidance. These issues, however, are far beyond the scope of what this Court needs to, or should, address for the purposes of this case. *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993) (when a case can be decided on purely statutory grounds the Court should follow a "prudential rule of avoiding constitutional questions"). Nonetheless, a brief rebuttal of these arguments is in order.

First, the assertion that protection of the nation's wildlife is merely a matter of state concern is belied by more than a century of direct federal involvement in wildlife conservation. Going back at least as far as the Lacey Act of 1900, 16 U.S.C. §§ 3371–3378 and 18 U.S.C. § 42, and the Migratory Bird Treaty Act of 1918

(MBTA), 16 U.S.C. §§ 703–711, this Court has consistently upheld federal regulation in this area. *See, e.g.*, *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding the MBTA); *Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) ("[the] assumption that the national commerce power does not reach migratory wildlife is clearly flawed.").

Circuit courts have unanimously followed the holdings in those cases to reject arguments that the ESA infringes on traditional state powers. As the Fourth Circuit held: "[E]ndangered wildlife regulation has not been an exclusive or primary state function" but is instead "an appropriate and well-recognized area of federal regulation." *Gibbs v. Babbitt*, 214 F.3d 483, 500 (4th Cir. 2000). *See also Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1078–79 (D.C. Cir. 2003) ("Far from encroaching upon territory that has traditionally been the domain of state and local government, the ESA represents a national response to a specific problem of 'truly national' concern.") (quoting *Gibbs*, 214 F.3d at 505). For that reason, the D.C. and Fourth Circuits have both concluded that the ESA is consistent with principles of federalism: "[T]o sustain challenges of this nature 'would require courts to move abruptly from preserving traditional state roles to dismantling historic federal ones.'" *Rancho Viejo*, 323 F.3d at 1079–80 (quoting *Gibbs*, 214 F.3d at 504).

Second, there is no serious constitutional question here. "The substantial relationship between the ESA and interstate commerce is patent." *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1006 (10th Cir. 2017), *cert.*

denied, 138 S. Ct. 649 (2018). When it enacted the ESA, Congress determined that endangered and threatened species are not only of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," 16 U.S.C. § 1531(a)(3), but also contain a genetic heritage of "incalculable" value. *Tenn. Valley Auth.*, 437 U.S. at 178. Congress was concerned as well with "the *unknown* uses that endangered species might have and the *unforeseeable* place such creatures may have in the chain of life on this planet." *Id.* at 178–79. *See also Palila v. Haw. Dep't of Land & Natural Res.*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) ("[A] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons . . . who come to a state to observe and study these species, that would otherwise be lost by state inaction.").

As all six circuits to address the issue have held, Congress properly determined that endangered and threatened species protection is economic and that protection of all imperiled species—no matter their current trade value or state of residence—is essential to preserving America's wildlife resources.[12] Even if an

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[12] *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017) (upholding ESA protection for the Utah prairie dog), *cert. denied*, 138 S. Ct. 649 (2018); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011) (delta smelt), *cert. denied sub nom. Orchards v. Salazar*, 565 U.S. 1009 (2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007) (Alabama

individual application of the ESA does not appear to affect commerce directly, Congress has the power to "'regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.'" *Gonzales v. Raich*, 545 U.S. 1, 25–27 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). As this Court has held, "[w]here the class of activities is regulated and that class is within the reach of federal power the courts have no power 'to excise, as trivial, individual instances of the class.'" *Raich*, 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)).

Congress intended the ESA to protect the dusky gopher frog and its critical habitat, which spans multiple states, as an essential part of the ESA's comprehensive scheme to preserve the nation's biodiversity heritage. Even if it could be argued that the designation of Unit 1 does not directly affect interstate commerce, "that the regulation ensnares some purely intrastate activity is of no moment." *Id.* at 22. Courts should not "excise individual components of that larger scheme." *Id.*

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sturgeon), *cert. denied*, 552 U.S. 1097 (2008); *GDF Realty Inv., Ltd. v. Norton*, 362 F.3d 286 (2004) (cave species), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (arroyo toad), *cert. denied*, 540 U.S. 1218 (2004); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf), *cert. denied sub nom. Gibbs v. Norton*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi Sands flower-loving fly), *cert. denied*, 524 U.S. 937 (1998).

Again, this Court need not engage these issues to resolve this case but, if it should be necessary, the result is the same. The designation of unoccupied critical habitat for the dusky gopher frog is well within the reach of federal power.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 17-71

In The Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of economic impact of designation is subject to judicial review.

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are economists and law professors with expertise in economic theory, cost-benefit analysis, the valuation of environmental goods, and environmental law and regulation. They teach and have published extensively on these topics in leading journals and with leading academic presses.

Amici have a particular interest in this case in the proper administration by the U.S. Fish and Wildlife Service (FWS) of its duties and authorities under the Endangered Species Act. They agree that FWS's critical habitat designation accords with both the requirements of law and fundamental principles of economics and therefore urge this Court to affirm the judgment below.

STATEMENT OF THE CASE

In 2011, based on a unanimous assessment by FWS's six peer reviewers that its initial critical habitat designation was "inadequate for the conservation of the dusky gopher frog," 77 Fed. Reg. 35,118, 35,123–24 (June 12, 2012), the FWS issued a revised proposed

[1] The parties' consent to the filing of this brief was filed with the Clerk of this Court in accordance with Supreme Court Rule 37. In addition, in accordance with Supreme Court Rule 37.6, Amici Curiae certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than Amici Curiae, has made a monetary contribution specifically for the preparation or submission of this brief.

designation. 76 Fed. Reg. 59,774, 59,783 (Sept. 27, 2011). This revised designation included Unit 1, with its rare ephemeral ponds, to address the peer reviewers' concern that without potential habitat outside Mississippi, the frog was "at high risk of extirpation" from "local catastrophic events," "such as disease or drought." 77 Fed. Reg. at 35,121, 35,125.

FWS considered the "economic impact" of this proposed critical habitat designation as required under ESA Section 4(b)(2). 16 U.S.C. § 1533(b)(2). It elected to hire an economics consulting firm, "Industrial Economics," to perform an economic analysis of the designation, including the inclusion of Unit 1. See INDUSTRIAL ECONOMICS, INC., ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATION FOR THE DUSKY GOPHER FROG (2012) [hereinafter EA], https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf . That analysis concluded that uncertainties precluded any quantification of benefits, making it impossible to know whether the designation would impose any cost at all on the landowners. The sources of this uncertainty include whether any potential development plans would be pursued, and if so, whether those plans would be subject to federal regulatory oversight requiring consultation procedures and development restrictions under Section 7 of the ESA. See 16 U.S.C. § 1536(a)(2).

With this uncertainty understood, the analysis identified three possible scenarios—with costs ranging from $0 to $34 million—that could occur *if* the landowners follow through with potential plans to pursue

residential development in Unit 1 in in the future. If they do not pursue residential development, but instead continue to use the land for timber production, as it has been for the last 100 years, or if proposed development proceeds without a federal nexus, the analysis estimated costs at or near $0. The analysis was unable to estimate the relative probabilities of the three scenarios.

On the benefits side, the analysis followed FWS's ordinary practice of concluding that benefits "are best expressed in biological terms." 77 Fed. Reg. at 35,141; EA at 2–18. Accordingly, the analysis described the various expected benefits of the designation wholly qualitatively, including increased potential for future conservation and recovery of the gopher frog; recreational and aesthetic values; existence values; and values to future generations. EA at 2–18, 5–1 to 5–2. It also discussed values stemming from the preservation and enhancement of ecosystem services, biodiversity, and increases in property values on nearby parcels due to open space preservation. *Id.* at 2–18, 5–2 to 5–3.

After soliciting additional rounds of public comment on its revised designation and accompanying Economic Analysis, the FWS issued its final critical habitat designation for the dusky gopher frog—including Unit 1—in 2012. 77 Fed. Reg. at 35,118–19. Because the Economic Analysis was inconclusive as to whether the benefits of Unit 1's inclusion outweighed the costs, or vice versa, the FWS did not exercise its discretion to exclude Unit 1 or any other areas

from the designation. *Id.* at 35,141. This challenge followed.

SUMMARY OF ARGUMENT

The FWS's Economic Analysis of the critical habitat designation for the dusky gopher frog was reasonable and should be upheld. It conforms with statutory requirements, with well-established standards for cost-benefit analysis across the federal government, and with widely-recognized principles of textbook economics.

This brief responds to two critical points regarding the reasonableness of the FWS's conclusion. First, petitioner mischaracterizes FWS's Economic Analysis as finding $34 million in costs and no benefits, and asserts on that basis that FWS's finding of no disproportionate costs was an abuse of discretion. See, e.g., Markle Merits Br. 18. Second, petitioner wrongly maintains that FWS's cost-benefit analysis was methodologically flawed. Both contentions are without merit.

The FWS's Economic Analysis of its critical habitat designation illustrates the inherent difficulties in quantifying the costs and benefits of critical habitat exclusion decisions and the wisdom of Congress's decision not to require formal, quantitative cost-benefit analysis in this context. FWS was unable to precisely quantify the costs of including petitioner's land in the designation, reporting instead three possible "scenarios," with costs ranging from $0 to $34 million. FWS

also could not quantify the relative probabilities of the scenarios but the practical circumstances of the case indicate that the low cost scenarios are more likely.

As a result of these uncertainties, the analysis followed the agency's usual practice of estimating benefits in entirely qualitative terms. Thus, FWS's Economic Analysis did not show a disproportion between costs and benefits; rather, it was inconclusive as to whether benefits outweigh costs or vice versa.

FWS's Economic Analysis was consistent with congressional intent as expressed in the plain language of Section 4(b)(2), 16 U.S.C. § 1533(b)(2), and the legislative history of the Endangered Species Act (ESA). Because Congress viewed the value of endangered species as "incalculable," it intended economic analysis under that section to be a broad, flexible weighing of often unquantifiable values. It also did not make the economic analysis decisive in the decision whether to exclude; rather it is one of a broad range of factors Section 4(b)(2) directs the wildlife agencies to weigh.

FWS's Economic Analysis was also consistent with the broader application of cost-benefit analysis throughout federal government and with well-accepted fundamentals of economic theory. The executive orders and accompanying guidance documents governing federal agencies' use of cost-benefit analysis emphasize the importance of qualitative descriptions of unquantifiable costs and benefits, as do classic texts in the economics literature.

ARGUMENT

I. Congress Intended the Section 4(b)(2) Economic Analysis to Be a Broad, Flexible Weighing of Often Unquantifiable Values.

The language and legislative history of ESA Section 4(b)(2) makes clear that Congress sought above all else to give flexibility and discretion to the FWS and the National Marine Fisheries Service (collectively, the wildlife agencies) in considering economic impacts and making exclusion decisions regarding critical habitat. Congress viewed the value of endangered species as "incalculable." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187–88 (1978). It therefore directed the wildlife agencies to conduct a rough, informal, apples-to-oranges comparison of costs and benefits. It also made that analysis one of a broad range of factors the wildlife agencies are to consider.

a. Congress Did Not Require a Formal, Quantitative Analysis of Costs and Benefits Because It Viewed the Value of Endangered Species as "Incalculable."

The parties to this litigation all agree that Section 4(b)(2) vests the wildlife agencies with enormous discretion and flexibility in making critical habitat exclusion decisions. The statute requires the agencies to "*consider*" economic impact, 16 U.S.C. § 1533(b)(2) ("[t]he Secretary shall designate critical habitat . . . after taking into consideration the economic impact"), and suggests that such consideration should take the

form of a comparison of costs to benefits. *Id.* (referencing the Secretary's "determin[ation] that the benefits of [excluding any area from critical habitat] outweigh the benefits of specifying such area"). When it comes to making a substantive decision on the basis of that economic analysis, the statute makes a conspicuous shift from "shall" to "may." *Id.* ("[t]he Secretary *may* exclude").

This shift in the plain language of the statute from mandate to discretion makes sense when one considers the kind of informal, intuitive weighing process Congress envisioned in adding this provision to the statute in 1978. Because Congress viewed the value of endangered species as unquantifiable, it did not require the agencies to perform formal cost-benefit analyses, in which each side of the balance is assigned a monetized value and compared with mathematical precision. Rather, Congress understood that these analyses would inevitably be inexact, apples-to-oranges comparisons necessarily requiring the grant of substantial discretion to the agency. See Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 194–96 (2004) [hereinafter Sinden, *Economics of Endangered Species*].

When it first passed the statute in 1973, Congress saw the value of endangered species as literally "incalculable." *Tenn. Valley Auth.*, 437 U.S. at 177–78 (quoting H.R. REP. NO. 93-412, at 4–5 (1973)). And when it amended the statute five years later, Congress's views in that regard had not changed. H. COMM. ON RULES,

PROVIDING FOR THE CONSIDERATION OF H.R. 14104, H.R. REP. NO. 95-1757 (1978), *reprinted in* CONG. RESEARCH SERV., LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 820 (1982) [hereinafter H.R. REP. NO. 95-1757, LEG. HISTORY] (statement of Rep. Murphy) ("[M]any species have a tremendous esthetic value which is difficult if not impossible to quantify.").

Congress's skepticism about the ability to quantify the benefits of protecting endangered species arose from two distinct concerns. The first was that we simply lack adequate scientific knowledge to fully understand a species' value. Accordingly, "[e]ach species is a perishable resource of unpredictable value," *Endangered Species Conservation Act of 1972: Hearings on S. 249, S. 3199, and S. 3818 Before the Subcomm. on the Env't of the S. Comm. on Commerce*, 92d Cong. 65 (1972) (statement of Sen. Mark Hatfield), and "we may never fully comprehend what we have lost." H.R. REP. NO. 95-1757, LEG. HISTORY, at 820 (statement of Rep. Murphy).

The second concern is that certain aspects of the value of endangered species—aesthetic and spiritual values, for example—may simply be incommensurable with dollars and therefore "impossible to quantify." H.R. REP. NO. 95-1757, LEG. HISTORY, at 820 (statement of Rep. Murphy); see also S. COMM. ON COMMERCE, ENDANGERED SPECIES ACT OF 1973, H.R. REP. NO. 93-307, *reprinted in* CONG. RESEARCH SERV., LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 374 (1982) (statement of Sen. Williams) ("Most animals are worth very little in terms of dollars and cents.

However, their esthetic value is great indeed. The pleasure of simply observing them . . . is unmeasurable."). That skepticism has been borne out in the subsequent practice of the wildlife agencies, which, in the decades since, have rarely made any attempts to quantify the benefits of critical habitat designations in their economic analyses. See Sinden, *Economics of Endangered Species*, at 180–83.

Congress's efforts to streamline the designation process in 1978 further demonstrate its intent that the agencies' Section 4(b)(2) economic analyses be quick and informal. In addition to giving the wildlife agencies flexibility to consider economic impacts, Congress was also concerned about the extended delays that had plagued critical habitat designation in the early years of the ESA's implementation. Accordingly, a number of the 1978 amendments aimed at speeding up the designation process by, for the first time, setting deadlines for the designation of critical habitat. 16 U.S.C. § 1533(b)(6)(C). This concern with streamlining provides further support for the idea that Congress had in mind a rough-cut economic analysis that would simply describe benefits in qualitative terms, rather than going to elaborate lengths to quantify and monetize. See Sinden, *Economics of Endangered Species*, at 194 ("Congress did not anticipate that the economic analysis would be an elaborate or time-consuming process.").

Indeed, Congress went so far as to specify that, once the final deadline arrives, the agency "must publish a final regulation, *based on such data as may be available at that time*." 16 U.S.C. § 1533(b)(6)(C)(ii)

(emphasis added). This is precisely the kind of language that courts have frequently cited as evidencing Congress's conscious decision to choose prompt agency action over regulatory perfection, particularly when scientific uncertainty precludes quantification of all relevant variables. See, e.g., *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 656 (1980) (plurality opinion) (under the "best available evidence" standard, an agency "is not required to support its finding that a significant risk exists with anything approaching scientific certainty"); *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1266 (D.C. Cir. 1980) (construing "best available evidence" as requiring agency to set standards promptly rather than "await[ing] the Godot of scientific certainty").[2]

b. Congress Did Not Make the Economic Analysis Decisive in the Decision Whether to Exclude.

Three aspects of the plain language of Section 4(b)(2) make clear that the economic analysis is not the sole driver when deciding whether to exclude an area from critical habitat. First, Section 4(b)(2) lists "economic impact" as simply one in a list of factors the

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[2] *Bennett v. Spear*'s reading of the phrase "best scientific and commercial data available" in Section 7 of the ESA is not to the contrary. 520 U.S. 154, 176-77 (1997). The *Bennett* Court noted that this phrase is "intended, at least in part, to prevent" "needless economic dislocation" caused by erroneous jeopardy determinations. *Id.* This is consistent with reading the phrase "based on such data as may be available at that time," 16 U.S.C. § 1533(b)(6)(C)(ii), as demonstrating a preference for promptness over perfection.

agency is to consider, with the list also including "the impact on national security" and the broad catch-all, "any other relevant impact." This catch-all phrase potentially encompasses a whole range of impacts, including positive impacts of designation for the species as well as other beneficial environmental, historical, or cultural impacts. Most importantly, this phrase makes clear Congress's intent that the agency's decision-making process on critical habitat exclusion encompass values other than quantifiable, economic ones. See Sinden, *Economics of Endangered Species*, at 193.

Second, the statute's use of the term "may" rather than "shall" in connection with the agency's decision to exclude any particular area requires an inference that there are at least some circumstances in which it would be reasonable for the agency to decline to exclude even where "the benefits of exclusion outweigh the benefits of [inclusion]." *Id.* at 149, 196 n. 295. This means that there must be some other factors, outside the economic cost-benefit analysis, that can, at least in some instances, drive the agency's ultimate decision whether to exclude.

Third, the same sentence goes on to explicitly name at least one such external, non-economic consideration that might sometimes trump an economic analysis: the survival of the species. Specifically, the last clause of Section 4(b)(2) makes clear that if the FWS determines a particular exclusion "will result in the extinction of the species concerned," the agency cannot exclude, even if the cost-benefit analysis otherwise warrants it. 16 U.S.C. § 1533(b)(2). A less definitive

concern—i.e., that an exclusion *might* result in extinction—might be precisely the sort of factor Congress intended FWS to weigh in making a discretionary decision not to exclude.

The legislative history confirms that Congress did not intend economic impact to be the determinative factor. The House Report made this explicit: "The Secretary is not required to give economics or any other 'relevant impact' predominant consideration in his specification of critical habitat. . . . The consideration and weight given to any particular impact is *completely within the Secretary's discretion*." H.R. REP. NO. 95-1625, at 741 (1978) (emphasis added). The word "flexibility" shows up again and again in the legislative history accompanying Section 4(b)(2). See, e.g., *id.* (noting Section 4(b)(2) provides "increased flexibility on the part of the Secretary in determining critical habitat"); H.R. REP. NO. 95-1757, LEG. HISTORY, at 819 (statement of Rep. Murphy) ("This bill introduces some needed flexibility into the [ESA]"); 124 CONG. REC. 21,334 (1978), *reprinted in* CONG. RESEARCH SERV., LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 1016 (1982) (statement of Sen. McClure) (noting "need to have some flexibility on the designation of the critical habitat").

II. Congress's Vision of Section 4(b)(2) Is Consistent With the Broader Application of Cost-Benefit Analysis and With Well-Accepted Fundamentals of Economic Theory.

Congress's vision of economic analysis under Section 4(b)(2) is entirely consistent with the broader application of cost-benefit analysis throughout the federal government. The executive orders that generally require federal agencies to conduct cost-benefit analysis in connection with major federal regulations consistently emphasize the importance of weighing unquantifiable impacts. Well-accepted fundamentals of economic theory likewise emphasize the importance of unquantifiable variables.

a. Executive Order 12,866 and Accompanying Guidance Documents Emphasize the Importance of Qualitative Descriptions of Unquantifiable Costs and Benefits in Cost-Benefit Analysis.

The use of cost-benefit analysis is widespread throughout the agencies of the federal government. Beginning with a series of executive orders dating back to the Reagan administration, federal agencies are required to prepare and submit to the Office of Management and Budget cost-benefit analyses in connection with all "significant" rulemakings (primarily those costing over $100 million).[3] Exec. Order No. 12,866

[3] Statutory requirements to conduct cost-benefit analysis, like Section 4(b)(2), are rare, especially in environmental statutes. The FWS did not deem its critical habitat designation for the

§§ 3(f), 6(a), 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 96, 97 (2016). Congress's intent that Section 4(b)(2) economic analyses take into account unquantifiable impacts is consistent with the approach taken in these executive orders, which emphasize that (1) both costs and benefits may be impossible to quantify, and (2) the importance of nonetheless considering such unquantifiable impacts. See Exec. Order No. 12,866 § 1(a) ("Costs and benefits shall be understood to include . . . qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider."); *id.* at § 1(b)(6) (similar); Exec. Order No. 13,563, § 1, 3 C.F.R. 215 (2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 109 (2016) (similar).

These requirements have been further refined and clarified in various guidance documents. See OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS 9–10 (2003) [hereinafter Circular A-4]; OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY IMPACT ANALYSIS: A PRIMER, https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf (last visited June 28, 2018) [hereinafter Primer]. These documents also stress the importance of unquantifiable costs and benefits. For example, the Office of Management and Budget's

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gopher frog a "significant" regulation, and therefore it was not technically subject to the executive orders. See 77 Fed. Reg. at 35,141-42. Nonetheless, the Economic Analysis for the gopher frog specifically referenced Executive Order No. 12,866, EA at 2-4, 2-18, as well as Circular A-4. EA at 2-2, 2-5, 2-18; see also 77 Fed. Reg. at 35,127, 35,141.

(OMB's) Circular A-4 states, "[i]t will not always be possible to express in monetary units all of the important benefits and costs." Circular A-4 at 2. Similarly, the Office of Information and Regulatory Affairs' Primer states that "some important benefits and costs . . . may be difficult or impossible to quantify or monetize given current data and methods." Primer at 12. In such circumstances, "[a]gencies should carry out a careful evaluation of non-quantifiable and non-monetized benefits and costs," *id.* at 12, "exercise professional judgment in determining how important the non-quantified benefits or costs may be," and perform a break-even analysis if they are determined to be "important." Circular A-4 at 2. Break-even analysis subtracts the incomplete benefits estimate from the (complete) costs estimate and then asks the analyst to make an intuitive judgment whether the remaining unquantifiable benefits are likely large enough to make up the difference. See Cass R. Sunstein, *The Limits of Quantification*, 102 CAL. L. REV. 1369 (2014).

Even when some degree of quantification is possible, quantitative estimates of both costs and benefits can also be subject to profound uncertainty, requiring agencies to express them in ranges or as a series of scenarios. OMB's guidance notes that "[i]n some cases, the level of scientific uncertainty may be so large that you can only present discrete alternative scenarios without assessing the relative likelihood of each scenario quantitatively." Circular A-4 at 39.

b. Well-Accepted Fundamentals of Economic Theory Also Emphasize the Importance of Taking into Account Qualitative Descriptions of Unquantifiable Variables in Cost-Benefit Analysis.

The federal government's broad approach to cost-benefit analyses mirrors the academic literature in economics,[4] which routinely recognizes that "not all impacts can be quantified, let alone be given a monetary value," and warns that "care should be taken to assure that quantitative factors do not dominate important qualitative factors in decision-making." Kenneth Arrow et al., *Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?*, 272 SCIENCE 221, 222 (1996); see also ANTHONY E. BOARDMAN ET AL., COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE 42 (4th ed. 2011) (noting that "technical limitations may make it impossible to quantify and then monetize all relevant impacts as costs and benefits" and urging the use of qualitative analyses in such instances); E. J. MISHAN & EUSTON QUAH, COST-BENEFIT ANALYSIS 241 (5th ed. 2007) (similar); EDWARD M. GRAMLICH, A GUIDE TO BENEFIT-COST ANALYSIS 136 (2d ed. 1997) (similar).

Indeed, the preservation (or loss) of an endangered species is perhaps the prototypical example of an impact that's difficult or impossible to quantify. See, e.g., GRAMLICH, *supra* at 136 (citing "loss of an endangered

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[4] See Circular A-4 at 21, 23 (noting that agency use of cost-benefit analysis should be "consistent with economic theory").

species" as an impact that "cannot easily be quantified"); Daniel H. Cole, *Law, Politics, and Cost-Benefit Analysis*, 64 ALA. L. REV. 55, 60–61 (2012) (similar).

Although several respected thinkers argue that any attempt to monetize environmental values is misguided because they are fundamentally incommensurable with money, see generally ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 785–86 (1994), economists have developed a number of techniques for trying to assign monetary sums to impacts like these. See generally DAVID W. PEARCE & ANIL MARKANDYA, ENVIRONMENTAL POLICY BENEFITS: MONETARY VALUATION (1989). "Revealed preference" techniques attempt to infer a dollar value for nonmarket goods by observing things that *are* traded in markets and are thought to reflect (or "reveal") the unpriced value. See generally David S. Brookshire et al., *Valuing Public Goods: A Comparison of Survey and Hedonic Approaches*, 72 AM. ECON. REV. 165 (1982); see also BOARDMAN ET AL., *supra*, at 353–57; Philip E. Graves, *Benefit-Cost Analysis of Environmental Projects: A Plethora of Biases Understating Net Benefits*, 3 J. BENEFIT-COST ANALYSIS 1, 12–19 (2012).

These techniques often take the form of hedonic valuation methods, which attempt to disaggregate environmental attributes from other goods with which they are bundled in the market in order to infer the value people place on them. See BOARDMAN ET AL., *supra*, at 353–57. For example, economists try to measure

how much value people attach to unspoiled open space by comparing the prices of properties located adjacent to such areas with those that are not. See, e.g., Elena G. Irwin, *The Effects of Open Space on Residential Property Values*, 78 LAND ECON. 465 (2002). The other primary revealed preference technique aimed at environmental and natural resource values—the travel cost method—involves inferring the value of environmental amenities from the costs people incur to travel to them. See BOARDMAN ET AL., *supra*, at 358–65.

Alternatively, where values cannot be "revealed" through actual market transactions, economists turn to "stated preference" methods. "Contingent valuation" or "willingness-to-pay" surveys, for example, attempt to measure people's willingness to pay for nonmarket goods by simply asking them. See BOARDMAN ET AL., *supra*, at 372–05; Thomas H. Stevens et al., *Measuring the Existence Value of Wildlife: What Do CVM Estimates Really Show?*, 67 LAND ECON. 390, 392–97 (1991). These are essentially sophisticated public-opinion polls that give respondents information about a particular natural resource and then ask them how much they would be willing to pay to preserve the resource or avoid the disease.

Such willingness-to-pay studies are usually designed to capture both what economists call "use values" and "non-use values" or "existence values." "Use values" reflect benefits people gain by actually making use of natural amenities—by, for example, hunting, fishing, hiking, or enjoying a scenic view. See BOARDMAN ET AL., *supra*, at 224. "Existence values," in contrast,

reflect benefits people gain by "the very existence of [natural amenities] that they neither visit, nor ever anticipate visiting." *Id.* at 224 (quoting John V. Krutilla, *Conservation Reconsidered*, 57 AM. ECON. REV. 777, 784 (1967)).

All of these methods are controversial and produce highly contestable results. See DAVID W. PEARCE & R. KERRY TURNER, ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT 141–58 (1990); Leonard Shabman & Kurt Stephenson, *Environmental Valuation and Its Economic Critics*, 126 J. WATER RESOURCES PLAN. & MGMT. 382, 382–84 (2000); Douglas R. Williams, *Valuing Natural Environments: Compensation, Market Norms, and the Idea of Public Goods*, 27 CONN. L. REV. 365, 401–07 (1995). Samples may be insufficiently large or insufficiently representative to produce meaningful results. In hedonic surveys, it may be difficult to control for all variables other than the presence or absence of the non-market good being valued. Many analysts regard willingness-to-pay surveys as unreliable because (1) the results depend heavily on how information is presented, and (2) respondents' answers are untethered to accurate knowledge of the resource at issue or any requirement to actually spend money. See, e.g., Stevens et al., *supra*, at 399. Finally, they are typically under-inclusive, measuring only a narrow swath of the full scope of species and/or ecosystem impacts, so that qualitative descriptions of benefits must supplement any numbers produced. See GRAMLICH, *supra*, at 136 (noting that hedonic valuation methods provide only "a lower-bound estimate"). For all these reasons,

the U.S. Environmental Protection Agency (EPA), often praised around the world as the gold-standard for sophisticated cost-benefit analysis, has shied away from using contingent valuation studies to generate specific estimates of regulatory benefits. See Amy Sinden, *Cost-Benefit Analysis, Ben Franklin, and the Supreme Court*, 4 U.C. IRVINE L. REV. 1175, 1203–07 (2014).

Such studies are also expensive and time consuming to conduct. As a result, it is rare for FWS to have a willingness-to-pay study available for the particular species at issue in a critical habitat designation. Sinden, *Economics of Endangered Species*, at 180–83.

Given these limitations, economists and other proponents of the use of cost-benefit analysis in agency decision making advise that cost-benefit analysis should not be the sole driver for all decision making, but rather should be one among a range of inputs. See Arrow et al., *supra*, at 122 ("[A]gencies should not be bound by strict benefit-cost tests."); BOARDMAN, *supra*, at 15 ("[cost-benefit analysis] is only one input to [the] political decision making process"). Professor Cass Sunstein, a prominent proponent of the use of cost-benefit analysis in agency decision making, has suggested that where endangered species are at issue, cost-benefit analysis may not be an appropriate decision tool at all. CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 68–69 (2002).

III. The FWS's Economic Analysis in This Rulemaking Complied with the Requirements of the ESA.

The Economic Analysis in this case emphasized the large uncertainties involved in attempting to predict the costs and benefits of the critical habitat designation for the gopher frog. It expressed benefits in purely qualitative terms and took a scenario approach to cost estimation, describing three potential scenarios in which costs range from $0 to $34 million. This approach was entirely consistent with both OMB guidance and good economics. The result was an inconclusive analysis. See 77 Fed. Reg. at 35,141 ("Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude. . . . "). This analysis fully complied with the requirements of the ESA.

a. FWS's Economic Analysis for the Gopher Frog Designation Was Unable to Quantify the Costs, Reporting Instead Three Possible "Scenarios" of Unknown Probability, With Costs Ranging From $0 to $34 million.

i. Designation Involves a Crystal Ball Inquiry That Is Inherently Fraught With Uncertainty

Estimating the costs of critical habitat designation, particularly the incremental costs associated with the inclusion of any particular area, is always fraught with uncertainty. The crux of the problem is that estimating critical habitat costs "essentially involve[s] predicting the future." See Sinden, *Economics of Endangered Species*, at 200.

These uncertainties are particularly acute where private land is at issue. The designation of critical habitat does not produce any regulatory restrictions on a private landowner's activities. The only duty the statute triggers with respect to critical habitat is the Section 7 duty to avoid "adverse modification," and that duty applies solely to federal agency actions. 16 U.S.C. § 1536(a)(2). Accordingly, regulatory restrictions on private landowners, along with attendant costs, only occur if the landowner engages in some activity with a federal nexus (e.g., federal permitting or funding). In such instances, the federal nexus triggers the relevant federal agency's duty under Section 7 to consult with the wildlife agencies to "insure" that the agency avoids "adversely modifying" critical habitat. *Id.* Even then,

the wildlife agencies often reach a compromise during consultation that allows the landowner's development project to go forward with minimal restrictions, and therefore minimal costs.

Indeed, empirical studies of the Section 7 consultation process have repeatedly shown that consultation hardly ever prevents projects from going forward, and indeed, very rarely produces a jeopardy or adverse modification finding at all. See Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the Endangered Species Act*, 112 PNAS 15844 (2015); Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141 (2012); DONALD BARRY ET AL., FOR CONSERVING LISTED SPECIES, TALK IS CHEAPER THAN WE THINK (1992), www.nativefishlab.net/library/textpdf/15635.pdf; U.S. GENERAL ACCOUNTING OFFICE, GAO-92-131BR, ENDANGERED SPECIES ACT: TYPES AND NUMBER OF IMPLEMENTING ACTIONS 31–32 (1992); H.R. REP. NO. 97-567, pt. 1 (1982).

The most recent of these studies analyzed 88,000 formal and informal consultations conducted between 2008 and 2015, and found that "no project was stopped or extensively altered as a result of FWS finding jeopardy or destruction/adverse modification." Malcom & Li, *supra*, at 15,845. Indeed, only two of the consultations analyzed produced a jeopardy and/or adverse modification finding at all—and a court overturned one of those, leaving only one jeopardy finding in place. *Id.* In that case, FWS allowed the project to proceed

with measures in place to minimize and partially offset the adverse effect on the species. *Id.*

Moreover, because consultations occur even in the absence of critical habitat designation (to ensure federal agencies do not "jeopardize" listed species), only some small portion, if any, of the already small percentage of consultations that result in significant development restrictions can actually be attributed to critical habitat designations. See Owen, *supra*, at 165–67 ("[C]ritical habitat designations had little effect on regulatory outcomes."). In short, even when a critical habitat designation triggers Section 7 consultation, it rarely imposes significant costs. See Erik Nelson et al., *Identifying the Impacts of Critical Habitat Designation on Land Cover Change*, 47 RESOURCE & ENERGY ECON. 89 (2016) (finding no significant difference in rate of land cover change between lands with and without critical habitat designations).

Accordingly, estimating the costs of including any particular area of privately owned land in a critical habitat designation requires (1) predictions about the kinds of development activities landowners are likely to pursue in the future; (2) predictions about the likelihood that such activities will involve a federal nexus; and (3) predictions about the likelihood, nature, and cost of any development restrictions that any resulting Section 7 consultations might impose. Thus, "the seemingly scientific numbers produced by such analyses actually rest on multiple layers of guesses and simplifying assumptions, each of which is subject to challenge. And errors in the early layers multiply as each

subsequent layer is added." Sinden, *Economics of Endangered Species*, at 200.

ii. The Economic Analysis for the Gopher Frog Designation, Which Found Costs Unquantifiable, Illustrates These Difficulties

The Economic Analysis of the designation of critical habitat for the gopher frog provides an illustration of these difficulties. The authors of the Economic Analysis judged the uncertainties associated with the cost calculation for Unit 1 so significant as to preclude a single quantitative estimate. Instead, the analysis developed three separate cost estimates based on three possible "scenarios" of how future events might unfold, even assuming the owners pursue residential development of the land (another source of considerable uncertainty).[5] Those three scenarios generated three highly disparate cost estimates—$0, $20 million, and $34 million—but the analysts were unable to quantify (or estimate in any way) their relative probabilities. EA at 4–15.

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[5] This scenario approach is entirely consistent with OMB guidance. See Circular A-4 at 18 ("When . . . benefit and cost estimates are uncertain . . . you should report benefit and cost estimates that reflect the full probability distribution of potential consequences. . . . If . . . lack of knowledge prevents construction of a scientifically defensible probability distribution, you should describe benefits or costs under plausible scenarios and characterize the evidence and assumptions underlying each alternative scenario.").

As noted above, the first step in generating a cost estimate requires predicting the kind of development the owners are likely to pursue. The Economic Analysis explained that Unit 1 is comprised of 1,544 forested acres that have been managed for timber harvest for the past 100 years. EA at 4–11. It covers only a small portion (3.5 percent) of much larger land holdings owned by six private landowners. EA at 4–6. One of those landowners is Weyerhaeuser; the other five have been leasing their land to Weyerhaeuser (or its corporate predecessor) since 1953. The current lease is set to expire in 2043. EA at 4–1.

In 2006, the five landowners "entered into an understanding with the Weyerhaeuser Real Estate Development Company (WREDCO)" to pursue a joint venture for residential development of the land "when market conditions are amenable." EA at 4–2. The current timber lease would be "released once [such] development occurs," and if the land is sold to a third party, the landowners and WREDCO have agreed on a division of the profits. *Id.*

While the area is fast growing and considered attractive for development, according to the Economic Analysis, "[d]evelopment plans for [unit 1] are currently delayed due to the recession and the negative real estate bank-lending environment. Recently, the landowner indicated that development may not occur until 2043. . . ." EA at 4–3; see also *id.* at 4–2, n. 68 ("There remains significant uncertainty regarding the timing of potential development activities within Unit 1."); AR 3564 (similar).

Designation only triggers regulatory action on private land *if* some development activity involves a "federal nexus," *if* that nexus triggers formal consultation under Section 7, and *if* that consultation then imposes development restrictions. Filling the ephemeral pools or other wetlands on Unit 1 in connection with residential development would only create a federal nexus if a Section 404 Clean Water Act permit, 33 U.S.C. § 1344(a), was required. It is unlikely that continued timber production would create such a federal nexus, because of a specific grandfathering exemption for existing timber operations in Section 404 of the Clean Water Act. 33 U.S.C. § 1344(f)(1)-(2).

Accordingly, if the landowners continue to manage the land for timber production, there will likely be no significant costs. The critical habitat designation will only trigger Section 7 consultation *if* the landowners pursue residential development, *if* those development plans require filling of pools, and *if* the pools turn out to be subject to Clean Water Act jurisdiction.[6] Even then, as discussed above, the costs of designation might well remain low because consultation rarely results in significant restrictions on development. Only *if* the landowners and the U.S. Army Corps of Engineers (Corps) are unable to negotiate reasonable and prudent alternatives that allow the development to go

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[6] It should be noted that any resulting development restrictions can only be attributed to the critical habitat designation if they would *not* have occurred under the jeopardy standard in the absence of the designation.

forward without undue harm to the frog habitat will there be significant costs.[7]

In short, if the landowners continue the land's current use for timber production, no regulatory activity under the ESA will likely be triggered, resulting in a cost of zero or close to it.[8] To the extent the landowners do pursue residential development on Unit 1, those plans are likely decades off and thus relatively speculative. The Economic Analysis notes that 2043, the predicted development date, "is beyond the 20-year timeframe of this analysis." EA at 4–3. Arguably these plans are too far out in the future and too speculative to be accounted for in the Economic Analysis at all. Nonetheless, all three scenarios in the analysis proceeded on the (conservative) assumption that the landowners would eventually pursue plans for residential development of lands within Unit 1. EA at 4–6.

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[7] The Analysis also discussed other potential costs that it concluded were too uncertain and speculative to quantify, including the possibility of oil and gas development on Unit 1, see EA at 4-5 to 4-6, the possibility of stigma effects, see *id.* at 2-17, and prescribed burns necessary "in order to properly manage the breeding sites within Unit 1." *Id.* at 4-3.

[8] The Economic Analysis notes that even if critical habitat designation does not actually result in any actual regulatory restriction on use of the land, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners. . . ." EA at 2-17. It also observes that such "stigma effects" are likely to decrease over time: "As the public becomes aware of the true regulatory burden imposed by critical habitat, the impact of the designation on property markets may decrease." *Id.*

Based on that assumption, the Economic Analysis described the three possible scenarios like this:

- Scenario 1 . . . assumes that development occurring within [Unit 1] avoids impacts on jurisdictional wetlands, [such that] there is no Federal nexus . . . triggering section 7 consultation[, generating an estimated cost of $0]. . . .[9]
- Scenario 2 . . . assumes the proposed development of Unit 1 requires a Corps CWA Section 404 permit . . . subject to section 7 consultation . . . [and] further assumes that [negotiations between the landowners and the Service] result[ ] in 40 percent of the Unit being developed[, generating an estimated cost of $20 million]. . . .
- Scenario 3 . . . again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation . . . [and further] assumes that . . . the Service recommends that no development occur within the unit[, generating an estimated cost of $34 million].

EA at 4–4. The analysis did not explicitly list a fourth possibility—what we might call "scenario #0"—in which no residential development occurs on Unit 1 at all.

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[9] This scenario could occur in two different ways: First, the Corps might decide that the pools are not within its jurisdiction. Second, the design for development might avoid the pools.

The analysis generated the dollar figures for each scenario by multiplying the number of acres on which development would be prohibited by $23,500, the price per acre at which "adjacent land with comparable zoning has been proposed for sale." EA at 4–6. Because the adjacent lands are also subject to Weyerhaeuser leases, the analysis inferred that this per acre price did "not include the value of the standing timber," but rather reflected only the value of the land for future development.[10] *Id.*

The analysis made no effort to characterize the relative probabilities of the three scenarios, but the existence of a fourth plausible scenario means that the probabilities of the three named scenarios likely sum to less than 100 percent. There is good reason to suggest that Scenarios 1 and 2 are more likely. First, FWS has a legal obligation to work with the landowners to identify "reasonable and prudent alternatives" that will allow development to go forward without causing jeopardy or adverse modification, 16 U.S.C. § 1536(b)(3), and those alternatives must be both economically and technologically feasible. 50 C.F.R. § 402.02 (definition

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[10] The analysis concedes that this per-acre price "is not a perfect proxy for development value of the critical habitat acres," but notes that it "represents the best available information." EA at 4-7. It is also worth noting that this price also potentially over-estimates the portion of the land's value attributable to future residential development potential because it presumably includes not just future residential development potential, but all future development potential, including future timber harvest (beyond the currently standing timber), which the critical habitat designation does not impair.

of "reasonable and prudent alternatives"). In this case, FWS's repeated statements that it "hope[s] to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds," indicate that Scenarios 1 and 2 are more likely than Scenario 3. 77 Fed. Reg. at 35,123; see also EA at 4–3 to 4–4 (noting that, as between Scenarios 2 and 3, FWS has called Scenario 2 "the most likely").

In addition, with respect to Scenario 1, it is significant that the FWS has described the pools at issue as "isolated." 77 Fed. Reg. at 35,123–24. Although the rules governing the Corps' Section 404 jurisdiction are currently in flux, even on the most liberal reading, the Corps' jurisdiction excludes "isolated" ponds that occur within one state's boundaries. See *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). Accordingly, there is a high likelihood that the Corps would find the ephemeral pools on Unit 1 to fall outside its jurisdiction such that even a residential development plan that required complete destruction of the pools would have no impact on *jurisdictional* waters and would therefore fall within Scenario 1. Even if the federal government were to assert jurisdiction under Section 404, Scenario 1 might still come to pass if the development was designed to avoid impacts to jurisdictional waters.

Finally, an understanding of the empirical literature on the Section 7 consultation process described above suggests that Scenario 3 is quite unlikely. See AR 3563 ("During section 7 consultations, the Service

works with our Federal partners to minimize the impacts of a particular action to designated critical habitat. Therefore, the likelihood of scenario 3 . . . is low.").

b. FWS's Economic Analysis for the Gopher Frog Estimated Benefits in Entirely Qualitative Terms.

i. The Enormous Challenges in Estimating the Benefits of Critical Habitat Designation Mean the Wildlife Agencies Typically Do Not Quantify These Estimates

The wildlife agencies rarely produce monetary estimates of benefits in their economic analyses of critical habitat designations. See Sinden, *Economics of Endangered Species*, at 180–83. Although there is a substantial literature showing the public's willingness to pay for the preservation of endangered species in general, it is rare for there to be willingness-to-pay studies on any particular listed species. Even rarer are studies that quantify the incremental value attributable to designating any particular area as critical habitat. See *id.*

Further exacerbating these economic valuation problems is the fact that virtually all of the sources of uncertainty described above for cost estimation also plague the benefits side of the balance. It is an inherently probabilistic enterprise—and one for which the necessary information to allow quantification, or even qualitative description of the relevant probabilities, is

usually lacking. It is thus no surprise that the long-running and widespread practice of the wildlife agencies is to describe these benefits in qualitative terms.

ii. The Economic Analysis for the Gopher Frog Designation, Which Found Benefits Unquantifiable, Illustrates These Difficulties

FWS's Economic Analysis of the critical habitat designation for the gopher frog was no exception. It discussed the fact that willingness-to-pay studies can generate quantified estimates of some of these benefits, but noted that no such studies exist for the gopher frog. See EA at 5–1 (citing J.B. Loomis & Douglas S. White, *Economic Benefits of Rare and Endangered Species: Summary and Meta-Analysis*, 18 ECOL. ECON. 197 (1996). Even if such studies did exist for the gopher frog generally (or for a sufficiently similar species), translating those general estimates into a specific estimate of "the incremental change in the probability of gopher frog conservation that is expected to result from [this particular] designation," or from the inclusion of any particular unit of critical habitat within the designation, would require even more granular studies. EA at 5–1.

Such studies would have to evaluate inherently uncertain and stochastic factors. FWS's whole purpose in adding Unit 1 was to provide a hedge against uncertain but potentially catastrophic events. The six peer reviewers were unanimous in their assessment that

without Unit 1, there was a "high risk" that "local catastrophic events" like "disease or drought" could eradicate the existing population of gopher frogs and their habitat in Mississippi. 77 Fed. Reg. at 35,121, 35,134–35. Thus, a study quantifying the additional benefits provided by the inclusion of Unit 1 would have to put a number on the probability of such stochastic events occurring. Not surprisingly, "[n]o [such] studies exist." EA at 5–1. They never do. Accordingly, the Analysis described the benefits of designation generally, and the inclusion of Unit 1 specifically, in entirely qualitative terms. See EA at 2–18.

This qualitative description of benefits was wide ranging, including both direct and ancillary benefits. The direct benefits described in the Analysis included "the maintenance or enhancement of the use and non-use value (e.g., existence value) that the public may hold specifically for the gopher frog." EA at 5–2. The use values included "wildlife-viewing opportunities [and] option[s] for seeing or experiencing the species in the future." EA at 5–1. The non-use values included "assur[ing] that the species will exist for future generations, and simply knowing a species exists, among other values." *Id.*

The Analysis also discussed ancillary benefits, noting that "critical habitat designation can result in maintenance of particular environmental conditions that may generate other social benefits aside from the preservation of the species." EA at 2–18. These include "the public's willingness to pay to preserve wilderness areas, for wildlife management and preservation

programs[;] protection of open space[;] and ecosystem maintenance." *Id.* at 5–1. As it did with respect to direct benefits, the Analysis indicated that, while such benefits likely exist, studies have not been done at a sufficient level of granularity to permit quantification of "the incremental values associated with this . . . critical habitat designation." *Id.*

The Analysis then went on to discuss a number of additional ancillary benefits that can be anticipated to occur in connection with "the avoidance of development in Unit 1." *Id.* at 5–2. These included increases in property values for neighboring or nearby parcels that may occur as a result of "open space or decreased density of development resulting from gopher frog conservation." *Id.* Economic modeling demonstrates that these impacts can be substantial, even outweighing the negative impacts to the value of the land designated. See John M. Quigley et al., *The Urban Impacts of the Endangered Species Act: A General Equilibrium Analysis*, 61 J. URBAN ECON. 299 (2007).

Ancillary benefits discussed by the Analysis also include "social welfare gains . . . associated with enhanced aesthetic quality of [the] habitat," EA at 5–2; "'[t]he maintenance or enhancement of use and non-use values for these other species" in the same ecosystem, EA at 5–3; a variety of ecosystem service benefits, including "protection and improvement of water quality and preservation of natural habitat for other species," as well as "improvements to ecosystem health that are shared by other, coexisting species," EA at 5–2 to 5–3;

and, finally, "[t]he maintenance or enhancement of . . . biodiversity in general." EA at 5–3.

The inclusion in cost-benefit analysis of "ancillary benefits"—i.e., those that are not the primary goal of the regulatory action but can nonetheless be expected to result from it—is basic, uncontroversial, textbook economics and is, in fact, required by OMB guidance. See, e.g., Boardman, *supra*, at 2 ("In CBA we try to consider *all of the costs and benefits to society as a whole.*") (emphasis added); Circular A-4 at 26 ("Your analysis should look beyond the direct benefits and direct costs of your rule and consider any important ancillary benefits and countervailing risks.").

c. The Cost-Benefit Analysis Was Inconclusive as to Whether Benefits Will Ultimately Outweigh Costs or Vice Versa.

Petitioners have raised a number of objections about the methods employed in FWS's Economic Analysis. See Weyerhaeuser Merits Br. 53–55. These objections were not raised with specificity before the court of appeals, see *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 475 (5th Cir. 2016) ("the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1"), nor were they included in the questions on which this Court granted certiorari. Accordingly, these objections are in contravention of Rule 24.1(a) and should be deemed forfeited. See *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("[T]his Court does not

decide questions not raised or resolved in the lower court[s]." (second alteration in original) (quoting *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*)).

In any event, the petitioner's objections to the Economic Analysis lack merit. The Economic Analysis properly emphasized the many layers of uncertainty on both sides of the balance, and ultimately, produced inconclusive results. Noting that the "benefits of the proposed rule are best expressed in biological terms," EA at 2–18 (emphasis omitted), the analysis described the benefits of the critical habitat designation in wholly qualitative terms. This does not mean that the benefits were zero. Nowhere did the Economic Analysis state that the designation would produce "no benefits." Rather, it identified and described a whole range of expected benefits in qualitative terms. In addition to the increased potential for future conservation and recovery of the gopher frog, these include recreational and aesthetic values; existence values; values to future generations, and values stemming from the preservation and enhancement of ecosystem services, biodiversity, and increases in property values of nearby parcels due to open space preservation.[11] On the other side of the balance, the analysis was also unable to quantify costs, instead outlining a series of three possible "scenarios," each of unknown probability.

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[11] Ironically, these enhancements in property value may in many instances accrue to the petitioners themselves, who own far more land in the vicinity than just the relatively small parcel that constitutes Unit 1.

As noted above, the same sources of uncertainty plague both the cost side and the benefit side of the analysis—in particular, uncertainty about the extent to which critical habitat designation will ultimately result in on-the-ground development restrictions. Because both costs and benefits are linked at least in part to development restrictions, they may fluctuate in concert. Where significant development restrictions impose high costs, those same restrictions may well provide significant environmental benefits.

Petitioners' assertion that costs will simultaneously be at their peak while benefits are zero is untenable as a matter of both law and fact. First, the argument that the designated critical habitat's value to the species is zero because the land is currently unoccupied flies in the face of the clear statutory text. Congress would not have made specific provision in the statute for the designation of unoccupied habitat if it did not believe that such habitat could provide significant potential value—or a kind of "option value"—for imperiled species. Second, as noted above, in the unlikely event that Section 7 consultation occurs and results in significant development restrictions (Scenario 2 or 3), it is also likely that the FWS and the landowners would find a "reasonable and prudent alternative" that would allow at least some development to go forward in exchange for management of the land to allow reintroduction of the frog. It is also possible that habitat protections under such a scenario would incentivize the landowners to sell to a land trust or other buyer interested in managing the land as frog habitat. In

that instance—where landowners' costs would likely be at their highest—biological and other benefits would also likely be at their highest point because frogs and the ecosystem would receive more protection.

In short, if substantial development restrictions do occur on the land, those restrictions will impose costs on the landowners. They will also generate benefits in the form of protections for the species, open space preservation, ecosystem services, and the many other benefits described in the Analysis.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,
Respondents.

On Writ of Certiorari to the United State Court of Appeals for the Fifth Circuit

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INTEREST OF THE *AMICUS CURIAE*[1]

The Energy and Wildlife Action Coalition ("EWAC") respectfully submits this brief as *amicus curiae* in support of Petitioner Weyerhaeuser Company. EWAC is an unincorporated association headquartered in Washington, D.C. comprised of electric utilities, electric transmission and distribution providers, renewable energy companies, and related trade associations. EWAC members operate throughout the United States.

EWAC's fundamental goal is to evaluate, develop, and promote reasonable environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

The Fifth Circuit's ruling, if affirmed by this Court, would have a significant negative impact on EWAC members. EWAC's members develop, construct, maintain, own, and operate electric generation, transmission, and distribution facilities that are located or proposed to be built on private and public lands, including lands that are not habitable by threatened or endangered species ("listed species"), and yet these areas could be designated as critical habitat for listed species under

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3(a), Petitioner and Respondents have provided blanket written consent to the filing of amicus briefs in this matter and their written consent is on file.

the criteria upheld by the divided panel of the Fifth Circuit.

Federal agencies are required to consult with the U.S. Fish and Wildlife Service ("Service") under section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), if a proposed facility is located on or crosses federal lands, requires a federal permit or approval, or receives federal financial support and may adversely affect a listed species or critical habitat. In other words, if critical habitat is present in any of these scenarios, section 7(a)(2) triggers additional review.

Thus, for example, many EWAC members have existing facilities on federal lands and will continue to construct new facilities across federal lands, often with few if any practical alternative locations, to meet the electricity needs of their customers. The siting of such infrastructure requires federal authorization and so can trigger section 7 review, including as to impacts on critical habitat. Furthermore, once constructed, electric energy infrastructure is likely to remain on the land for many decades. Critical habitat designations can affect the renewal of authorization for use of the federal lands, affecting existing infrastructure and constraining operation and maintenance of existing facilities on both private and public lands.

Further, many EWAC members' facilities on public or private lands require federal approvals such as Clean Water Act ("CWA") section 404 permits and Federal Energy Regulatory Commission ("FERC") licenses and some receive federally backed financing. Again, these federal actions can trigger section 7. And even absent the need for federal approvals, the existence of critical habitat or the threat of a potential critical habitat designation within a facility's footprint

complicates private financing, as lenders and investors react to the increased costs and risks posed by critical habitat, which can increase the cost of capital or result in financial reserve requirements, bonding or parent company guarantees, all of which make financing more difficult and more expensive and can even result in the demise of the project.

SUMMARY OF ARGUMENT

The Fifth Circuit wrongly upheld a decision by the Service that unlawfully designated an area in Louisiana as "critical habitat" for the endangered dusky gopher frog (*Rana sevosa*) even though there is no occurrence of the species on those lands, that area cannot sustain the species, now or in the foreseeable future, and there is no connection to any area that is actually habitable by that species. *See* Pet. App. 1a-77a.

In reviewing the Service's action, the Fifth Circuit incorrectly limited its analysis to the ESA's definitions of occupied and unoccupied "critical habitat," 16 U.S.C. § 1532(5)(A), and ignored the criteria for critical habitat contained in sections 4 and 7 of the ESA, the statute's operative provisions, which specify that critical habitat is a subset of the habitat of a listed species. 16 U.S.C. §§ 1533(a)(3)(A), 1536(a)(2); Pet. App. 15a, 18a, 23a-32a.

The Fifth Circuit's narrow focus on the ESA's definition of "critical habitat," to the exclusion of the operative provisions of the statute, allowed it to wrongly conclude: "There is no habitability requirement in the text of the ESA or the implementing regulations." Pet. App. 23a.

To the contrary, the requirement that critical habitat be part of the habitat of a species is a plain and unambiguous requirement of the ESA. When the

Service lists a species under the ESA, the statute directs the Service, "to the maximum extent prudent and determinable," to designate by regulation "*any habitat of such species* which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A) (emphasis added). The ESA also requires federal agencies to consult with the Service before undertaking or authorizing an action that is likely to destroy or adversely modify "habitat . . . which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2).

The Fifth Circuit also improperly deferred to the Service's interpretation of the phrase "essential to the conservation of the species" in the ESA's definition of unoccupied critical habitat, 16 U.S.C. § 1532(5)(A)(ii), wrongly concluding that this phrase is the sole test for designating unoccupied critical habitat and accepting a Service interpretation of "essential" that conflicts with the plain and unambiguous requirement of section 4 of the ESA that critical habitat be "habitat of such species." 16 U.S.C. § 1533(a)(3)(A)(i).

As a result of these errors, the Fifth Circuit blessed a standard that allows an area to be designated as "critical habitat" even if it is currently uninhabitable by a listed species and has no prospect of ever becoming habitable by that species. This fails to recognize that "critical habitat" is, first and foremost, habitat for a listed species. Among other consequences, this unlawfully broad reading of critical habitat would impose an unworkable and unreasonable regulatory burden on the development and continuing operation of electric energy infrastructure throughout the country.

Electricity generation, transmission and distribution facilities are located throughout the United States. The total available installed electrical generating capacity in the United States is currently about

1,200 gigawatts from all sources (conventional and renewable).[2] The electric transmission network is the backbone of the nation's energy grid and consists of more than 600,000 circuit miles of lines, 240,000 of which are considered high-voltage lines.[3] There is also a spider web of distribution lines delivering electricity from substations to consumers. Electricity generation, transmission and distribution facilities may be found in every corner of our country. As a result, the electric energy industry frequently interacts with listed species and critical habitat and has a profound interest in the proper designation of critical habitat for listed species.

There are real consequences for the nation's electricity generation, transmission, and distribution infrastructure that will result from designating areas uninhabitable by a listed species as "critical habitat" and from extending the protections of the ESA to those areas. Through this *amicus* brief, EWAC offers the Court a window into how the Fifth Circuit's decision could disrupt the development and ongoing operation of its members' facilities.

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[2] Federal Energy Regulatory Commission, Office of Enforcement, Energy Market Snapshot (June 2017), available at: https://www.ferc.gov/market-oversight/mkt-snp-sht/2017/06-2017-snapshot-national.pdf.

[3] Edison Electric Institute, Transmission, available at: http://www.eei.org/issuesandpolicy/transmission/Pages/default.aspx.

ARGUMENT

I. The ESA dictates that "critical habitat" must be habitable.

A. The operative provisions of the ESA plainly state that critical habitat must be habitable.

One of the purposes of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The ESA is structured to protect the ecosystems upon which a listed species depends through its provisions for designating and protecting habitat that is determined to be critical for that species – section 4 (the designation of critical habitat) and section 7 (federal interagency consultation). 16 U.S.C. §§ 1533(a), 1536.

By its terms, section 4 of the ESA does not authorize the Service to designate an area that is not habitable by a listed species as "critical" for that species. It directs that, when the Service lists a species, it shall, "to the maximum extent prudent and determinable," designate by regulation "*any habitat of such species* which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). Under this provision, lands that are not "habitat of such species" cannot be "critical habitat."

Section 4's criteria for "critical habitat" also include a temporal element: designation is limited to habitat that is considered critical at the time the species is listed ("then considered to be"). *Id.* The designation of critical habitat may be revised "from time-to-time thereafter as appropriate," *id.* at § 1533(a)(3)(A)(ii), which allows the Service to account for changes in habitat over time. But nothing in section 4 authorizes

the Service to designate as "critical" an area that is not currently habitable by the species, even if it might become habitat at some future date.

Using nearly identical phrasing, section 7 of the ESA also describes critical habitat as a subset of a species' existing habitat:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of *habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical* [pursuant to section 4] . . . .

16 U.S.C. § 1536(a)(2) (emphasis added). Section 7, like section 4, is thus explicit that critical habitat must first and foremost be habitat of the listed species.

The ESA's definitions (section 3 of the Act) supplement the criteria for designating "critical habitat" found in section 4, describing different requirements depending on whether the area was occupied or unoccupied by the species at the time the species was listed. 16 U.S.C. §§ 1532(5)(A)(i) and (A)(ii). The additional criteria contained in these definitions must be read in conjunction with the unambiguous statements in sections 4 and 7 that critical habitat is a subset of the habitat for a listed species. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S. Ct. 1252, 1257 (2006) ("Interpretation of a word or phrase

depends upon reading the whole statutory text [and] considering the purpose and context of the statute.").

Although the ESA does not expressly define what constitutes "habitat" for a listed species, the term "critical habitat" is founded on the concept that the area being designated must in fact be habitat – that it is habitable by a listed species. Thus, for example, the ESA states that, absent special circumstances, "critical habitat shall not include the entire geographic area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). The clear implication is that to be critical habitat for a listed species, an area must be one that "can be occupied" by that species. This directive echoes, and appears intended to be equivalent to, the directive in ESA sections 4 and 7 that critical habitat be a subset of habitat for the listed species.

In the absence of an express statutory definition of "habitat," the Court must look to the ordinary meaning of the word and to the way it is used in the ESA as a whole. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. U.S.*, 444 U.S. 37, 42, 100 S. Ct. 311, 314 (1979).

The Merriam-Webster Dictionary defines "habitat" as "the place or environment where a plant or animal naturally or normally lives and grows," or, as a secondary definition, "the place where something is commonly found." "Habitat," Merriam-Webster Dictionary (11th ed. 2016). These dictionary definitions are consistent with the purposes of the ESA, *see* 16 U.S.C. § 1531(b), as Congress selected the word "habitat" to refer to the ecosystems upon which listed species depend. The dictionary definitions of "habitat" also are consistent

with the concept of an area that "can be occupied" by the species. *See* 16 U.S.C. § 1532(5)(C). The word "habitat," as it is used in the ESA, thus indicates that the area in question must be capable of sustaining a particular species even if that species does not currently occupy the area.

Accordingly, when ESA sections 4 and 7 refer to the designation of "habitat of such species" as "critical habitat," they mean a place where a plant or animal naturally lives and grows; a place that is capable of sustaining the species; a place that is habitable by the species.

B. The Fifth Circuit's analysis ignored the operative provisions of the ESA and the plain meaning of the word "habitat."

The Fifth Circuit panel, as it upheld the designation of lands in Louisiana as unoccupied critical habitat for the dusky gopher frog, limited its analysis to the ESA's definitions of occupied and unoccupied critical habitat. *See* Pet. App. 15a, 18a, 23a-32a (majority opinion analyzes only sections 1532(5)(A)(i)-(ii)). It did so even though those lands cannot sustain the frog today and are not likely to be capable of doing so in the reasonably foreseeable future without significant human manipulation. *Id.*

The ESA's definitions differentiate between occupied and unoccupied critical habitat. Occupied critical habitat, not surprisingly, must be occupied by the species at the time the species is listed as threatened or endangered. 16 U.S.C. § 1532(5)(A)(i). It also must contain physical and biological features that: (1) are "essential for the conservation of the species"; and (2) "may require special management considerations or protection." *Id.* Unoccupied critical habitat is lim-

ited to areas that are not occupied at the time of species listing but nevertheless are deemed "essential for conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

Looking only at these provisions, the Fifth Circuit determined – wrongly – that the sole criterion the ESA provides for designating unoccupied critical habitat is found in section 3(5)(A)(ii), 16 U.S.C. § 1532(5)(A)(ii), and entails a Service determination that the area is "essential" for conservation of the listed species. Pet. App. 15a, 18a, 21a-24a. The Fifth Circuit then ruled that the ESA does not define "essential," that the word is ambiguous, and accordingly that the Service's determination that an unoccupied area is "essential" and so should be designated as critical habitat (without regard to whether the area is habitable) is entitled to *Chevron* deference. Pet. App. 15a, 21a-24a, citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778 (1984).

The Fifth Circuit found ambiguity by erroneously focusing exclusively on the word "essential" in section 3(5)(A)(ii) and ignoring the additional criteria for critical habitat contained in sections 3(5)(C) and 4, 16 U.S.C. §§ 1532(5)(C) and 1533(a)(3)(A)(i). It also ignored the way the word "habitat" and the phrase "critical habitat" are used in context in ESA sections 4 and 7, 16 U.S.C. §§ 1533(a)(3)(A)(i) and 1536(a)(2), the operative provisions of the statute.

Statutory "[i]nterpretation of a word or phrase depends upon reading the whole statutory text [and] considering the purpose and context of the statute." *Dolan*, 546 U.S. at 486. "A word in a statute may or may not extend to the outer limits of its definitional possibilities." *Id.* "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a

permissible construction of the statute." *Chevron*, 467 U.S. at 843. The ESA must be read and considered as a whole to determine the meaning of "critical habitat."

By their language and structure, ESA sections 4 and 7 make clear that "critical habitat" – including unoccupied critical habitat – is a subset of a species' habitat in existence at the time of the species' listing, and as such it must be capable of supporting that species. The ESA's definition of unoccupied "critical habitat" in section 3(5)(A)(ii) informs the application of sections 4 and 7, but also must be read in harmony with the use of the term "critical habitat" in those operative sections of the statute. If any ambiguity exists in the section 3(5)(A)(ii) definition, then the first source for guidance must be the rest of the statute – here, primarily the operative provisions of section 4 and section 7 that authorize the designation of "habitat of such species" as critical habitat and ensure that the actions of federal agencies are not likely to result in the "destruction or adverse modification of habitat of such species which is determined . . . to be critical." *See* 16 U.S.C. §§ 1533(a)(3)(A)(i), 1536(a)(2).

Further, the Fifth Circuit ignored section 3(5)(C), another element of the ESA's definition of "critical habitat" providing that "critical habitat shall not include the entire geographic area which can be occupied by the threatened or endangered species," except in circumstances determined by the Service. 16 U.S.C. § 1532(5)(C). This provision reinforces the directive in section 4 and the implication of section 7 that "critical habitat" should be a subset of the listed species' habitat – the "geographic area which can be occupied" by the species. No reasonable reading of section 3(5)(C) would authorize the designation of

critical habitat that is *outside* of the geographic area which can be occupied by a listed species.

The Fifth Circuit dismissed the possibility that unoccupied critical habitat must be habitable by the listed species by pointing to differences in the language the ESA uses to define occupied and unoccupied critical habitat, 16 U.S.C. §§ 1532(5)(A)(i) and (A)(ii). Pet. App. 23a-24a. Occupied critical habitat must have "physical and biological features" essential to the conservation of the species, while unoccupied habitat must be in "areas" essential for the conservation of the species. *Id.* The Fifth Circuit ruled that requiring unoccupied areas to contain the essential physical and biological features needed to sustain a listed species "effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land." *Id.* (emphasis in original).

In so holding, the Fifth Circuit placed too much weight on the reference to biological and physical characteristics in section 1532(5)(A)(i), as if this were the only reference to the suitability of an area to the listed species to be found in the ESA. To the contrary, ESA sections 3(5)(C), 4 and 7 plainly state that critical habitat is a subset of the habitat of a listed species or a subset of the area that can be occupied by the species. Occupied critical habitat is distinguished from unoccupied critical habitat by the fact that it was occupied by the species at the time the species was listed. In defining occupied habitat as critical, the ESA points to the presence of physical and biological characteristics that are deemed essential to the conservation of the species, distinguishing "critical habitat" from "all habitat." But the ESA, at its base, requires that both occupied and unoccupied critical

habitat be part of the habitat for a listed species. *See* 16 U.S.C. §§ 1533(a)(3)(A)(i), 1536(a)(2).

The failure to read the term "critical habitat" with an eye to the context in which that term is used in sections 4 and 7 and without referencing the additional criteria for critical habitat found in sections 3(5)(C) and 4 resulted in the Fifth Circuit giving improper *Chevron* deference to a Service interpretation of the ESA's definition of unoccupied critical habitat. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666, 127 S. Ct. 2518, 2534 (2007) (internal quotation omitted). Failure to follow this basic canon resulted in Fifth Circuit deference to and adoption of a mistaken Service interpretation that is patently inconsistent with the plain meaning of the criteria for critical habitat set out in other ESA provisions.

C. The Service's determination that lands may be deemed "essential to the conservation of a species" even though not habitable by that species now or in the reasonably foreseeable future is not entitled to *Chevron* deference.

Any ambiguity the Fifth Circuit perceived in the meaning of "critical habitat" derives from isolating that term and the word "essential" from how "critical habitat" is used in operative provisions of the statute and from the plain meaning of the word "habitat." The Fifth Circuit should not have moved beyond the first step of *Chevron* and should not have extended deference to the Service's interpretation.

Deference to the Service "is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text." *Nat'l Ass'n of Home Builders*, 551 U.S. at 665 (2007) (quoting *Chevron*, 467 U.S. at 843).

As this Court has established:

> In making the threshold determination under *Chevron*, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." Rather, [t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context . . . It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

Id. at 666 (*quoting Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S. Ct. 1291, 1300 (2000)) (internal citations omitted). "A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Util. Air Regulatory Grp. v. Envtl. Prot. Agency*, 573 U.S. ___, ___, 134 S. Ct. 2427, 2442 (2014), (*quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 630 (1988)) (ellipsis in original).

Here, congressional intent is clear that critical habitat is a subset of the habitat of a listed species. 16 U.S.C. §§ 1532(5)(C), 1533(a)(3)(A)(i), 1536(a)(2). The Fifth Circuit never considered those provisions. If it had done so, it would not have erroneously claimed

that "there is no habitability requirement in the text of the ESA." Pet. App. 23a.

Consistent with the holdings of this Court, the Fifth Circuit should not have confined itself to examining a particular statutory provision in isolation, as the definition of unoccupied critical habitat in section 3(5)(A)(ii) that may otherwise appear ambiguous in isolation is indeed clarified by the remainder of the statutory scheme, namely sections 3(5)(C), 4 and 7. *See Food and Drug Admin.*, 529 U.S. at 132; *Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S. Ct. at 2442. The only potential meaning of unoccupied critical habitat, as defined by ESA section 3(5)(A)(ii), that is also compatible with the rest of the ESA is that critical habitat – *including* unoccupied critical habitat – must be habitable and thus capable of supporting the species for which it is designated. *See Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S. Ct. at 2442. In light of the statute's unambiguous directive that critical habitat be habitable, the Fifth Circuit should have stopped after the first step in its *Chevron* analysis.

In any event, the Fifth Circuit's *Chevron* step 2 analysis is equally flawed, as it erred in endorsing the Service's unreasonable exclusion of habitability from the criteria for critical habitat. The ESA may not define the term "essential for the conservation of the species," but it has placed boundaries on what may be considered "essential"; Congress has clearly stated that critical habitat must in fact be habitable. *See* 16 U.S.C. §§ 1532(5)(C), 1533(a)(3)(A)(i), 1536(a)(2). "Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regulatory Grp.* 573 U.S. at ___, 134 S. Ct. at 2442 (*quoting City of Arlington, Tex. v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 296, 133 S. Ct.

1863, 1868 (2013)). *Chevron* "directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Mich. v. Envtl. Prot. Agency*, 576 U.S. __, __, 135 S. Ct. 2699, 2707 (2015). But an agency's reading of a statute must still remain within the bounds of reasonable interpretation. *Id.*

Reading the ESA to allow an uninhabitable area to be designated as "critical habitat" strays far beyond the bounds of reasonable interpretation and cannot survive judicial scrutiny. *See id.* (EPA wrongly interpreted the word "appropriate" in the Clean Air Act provision as allowing it to ignore costs of pollution controls).

There are limits to the meaning of "essential," and so to the Service's discretion. Here, the Service designated as "essential" an area that currently provides no conservation benefit to the dusky gopher frog and will not do so in the future. To deem an area "essential" to a species that has no connection to the areas in Mississippi that are currently occupied by the species and no foreseeable ability to sustain the species goes beyond the bounds of reason. Even where *Chevron* deference does apply, it has limits, and those limits were exceeded here. *See id.*

II. Designating areas that are not habitable by a listed species as "critical habitat" harms the development and operation of the nation's energy infrastructure.

Critical habitat designation can directly constrain the location of energy generation, transmission, or distribution projects, impose permitting delays, cause higher installation and operating costs, and increase financing costs. This is particularly true if there is no

requirement that the lands in question possess suitable characteristics to sustain listed species, as there is no way a project proponent could foresee and plan for the designation. This, in turn, increases the cost of energy production and transmission, a cost that is passed on to consumers unless the company that is developing or operating the affected facilities is constrained by contract or regulation from doing so. The practical implications of the Fifth Circuit's ruling are evident when applied to the development, operation and maintenance of the nation's electric energy infrastructure.

A. The electric energy industry in the United States is investing heavily in new generation, transmission and distribution facilities and in enhancing the nation-wide electric grid.

The United States is in the midst of an evolution in its electric energy infrastructure. The means of generating electricity have been changing, particularly in the last decade, with planned and completed retirement of a significant number of conventional (mainly nuclear and coal-fired) power plants, the development of new renewable (wind, solar and other sources) and natural gas-fired generation, and noticeable growth in distributed energy resources (rooftop solar, small-scale wind, and net metering), energy storage (battery facilities and electric vehicles) and efficiency. These trends are expected to continue in the coming years.

The U.S. wind industry installed 7,017 megawatts ("MW") of new electric energy generating capacity and repowered 2,136 MW of existing capacity in 2017, bringing the total installed capacity for wind energy generation in the United States to 89,077 MW, or more

than 89 gigawatts ("GW").[4] An additional 28,668 MW of wind generating capacity was under construction or in advance development at the end of 2017.[5]

The U.S. Solar industry installed 10,608 MW in 2017 and now has over 53 GW of total installed solar generating capacity.[6] Solar energy has ranked first or second in new electric generating capacity additions in each of the last five years.[7]

Billions of dollars are also being invested in the nation's electric transmission system – over $20 billion in 2016 and more in 2017.[8] The factors driving these investments include enhancing reliability, grid resiliency and modernization, relieving market congestion, developing smarter energy infrastructure, improving economic and market efficiency, and expanding the transmission system to integrate renewables into an evolving generation mix. The industry also is making significant investments in a more dynamic and secure transmission system. Consistent with federal and state policies, transmission projects are planned through the use of open and transparent processes that include analysis and consideration on a comparable basis of

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[4] American Wind Energy Association, U.S. Wind Industry Fourth Quarter 2017 Market Report, available at: http://awea.files.cms-plus.com/FileDownloads/pdfs/4Q%202017%20AWEA%20Market%20Report%20Public%20Version.pdf.

[5] *Id.*

[6] Solar Energy Industry Association, U.S. Solar Market Through 2017: Key Takeaways, available at: https://www.seia.org/solar-industry-research-data.

[7] *Id.*

[8] Edison Electric Institute, available at: http://www.eei.org/issuesandpolicy/transmission/Documents/bar_Transmission_Investment.pdf.

proposed transmission solutions and alternate, non-transmission solutions. Justification for new-build or upgrades of existing facilities has to be provided to the appropriate regulatory and stakeholder groups.

As discussed below, the understanding of "critical habitat" endorsed by the Fifth Circuit puts these investments at risk. Energy infrastructure projects – both new construction and enhancement of existing facilities – take years to plan and execute. Once constructed, they typically remain in service for decades – 30 or 50 years, or more. Thus, a key consideration in planning and executing these projects is not only recognizing and designing the project to avoid and minimize current potential adverse environmental impacts, but also anticipating and planning for potential changes in regulatory requirements during project development and the operating life of the facility.

The Fifth Circuit has endorsed a regulatory wild card; it is impossible for an energy project developer to anticipate and plan for the costs and delays that are likely to result from the designation of an area that cannot sustain a listed species, now or in the reasonably foreseeable future, as critical habitat for that species. The resulting uncertainty can cause needed energy projects to be delayed or cancelled. And should projects proceed despite being affected by the designation of uninhabitable "critical habitat," the resulting increased costs will likely be passed on to the residential, commercial and industrial consumers of electricity, with no discernible biological benefit from "protecting" an area that cannot sustain the species.

B. Energy projects that could have an adverse effect on critical habitat face significant costs, likely delays, and higher operating costs.

The regulatory impact of a critical habitat designation arises under ESA section 7(a)(2), which requires consultation if some discretionary federal action may affect a listed species or its critical habitat. *See* 16 U.S.C. § 1536(a)(2). When an energy facility is located on or crosses federal lands, requires a federal permit, or receives federal funding, one or more discretionary federal actions are likely to be required for the facility to be developed and additional discretionary federal actions may occur over the operating life of the project. A federal agency also may retain sufficient discretionary control during the operating life of the facility that it is obligated to reinitiate ESA consultation if newly designated critical habitat may be adversely affected by operation and maintenance of the facility. *See* 50 C.F.R. § 402.16(d).

It is common for new and existing energy facilities to prompt one or more of the potential triggers for ESA section 7 consultation: federal lands; federal permits; or federal financing. If critical habitat is present in any of these scenarios, ESA section 7(a)(2) obligates the federal action agency to conduct additional review. If this review results in a finding that the activity may affect critical habitat, then the agency must complete a formal consultation with the Service before the federal action can proceed. 50 C.F.R. § 402.14(a). The consultation process includes preparation of a biological assessment by the project proponent and the federal action agency, *see* 50 C.F.R. §§ 402.12, 402.14(c), and the issuance of an often lengthy and complex biological opinion by the Service, imposing a myriad

of requirements to reduce impacts. *See* 50 C.F.R. §§ 402.14(g) & (h). This additional review and the requirements imposed can result in significant increases in the time and cost for the affected project and changes in the project to minimize and mitigate for habitat impacts.

A few examples amply demonstrate the challenge the ESA can pose for energy projects. In many parts of the country, it is virtually impossible to site electrical infrastructure of any significant length or size and avoid stream crossings and wetlands impacts. If construction includes what the U.S. Army Corps of Engineers (the "Corps") has classified as dredging or filling of waters of the United States ("WOTUS"), then a permit is needed from the Corps under section 404 of the Clean Water Act ("CWA"). 33 U.S.C. § 1344. Many linear projects require section 404 permits for potential WOTUS impacts at multiple crossings along their routes. A utility scale renewable energy project likewise may include a number of Corps-regulated drainages within its project area. The issuance of a section 404 permit triggers the ESA's consultation requirement, which obligates the Corps to consider the potential effect of the activity on critical habitat. *See* 16 U.S.C. § 1536(a)(2).

The Corps has developed a streamlined Nationwide Permit ("NWP") program under CWA section 404 "to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). EWAC members regularly rely on the NWP program for expedited authorization to construct, operate, and maintain their facilities. For example, NWP 12 authorizes utility line work with limited impacts on wetlands and waterbodies:

> Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017).

An activity must adhere to a set of general conditions to be authorized under the NWP. In most cases the NWP program allows activities to be "self-certified" without any involvement by the Corps. General Condition 18, however, requires that non-federal permittees (such as EWAC members) notify the Corps if any designated "critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat," so that the Corps can meet its obligations under ESA section 7(a)(2). The Corps has expressly stated that "might affect" is a "low reporting threshold" to trigger notification. 82 Fed. Reg. at 1954.

If the notification requirement of General Condition 18 is triggered, the activity cannot proceed until the Corps has completed its ESA section 7(a)(2) obligations. 33 C.F.R. § 330.4(f)(2). Thus, a project proponent is thrown into a delayed permitting pathway if critical habitat might be affected or is within the vicinity of its NWP activity. *Id.* If the Service does conclude that adverse effects are likely and requires formal consultation, the Service's Biological Opinion likely will require the implementation of measures that add further costs and delays, defeating the NWP objective of regulating "with little, if any, delay or paperwork." 33 C.F.R. § 330.1(b).

Even where the federal nexus arises out of a small portion of a project (for example, a single stream crossing), ESA section 7 analysis can sweep in portions of a project that do not have a federal nexus. While the Corps focuses its 404 permitting decision on the area around NWP-regulated dredging or fill, the Service will look beyond those areas and evaluate the entire project for effects to critical habitat. *See* U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act ("Section 7 Consultation Handbook") at 4-18 (March 1998) ("For example (Figure 4-6), if the proposed action is a wetland fill (requiring a federal permit) to accommodate access to a proposed development (the actual area of impact to the species), then the development is included in the action area.") ("Section 7 Consultation Handbook").[9] The Service's broad analysis effectively means that a small federal activity (involving less than ½ acre of dredge or fill) can federalize the entire project for purposes of the Service's review under ESA section 7(a)(2).

Another example is renewable energy projects sited on federal lands and linear facilities that cross those lands. The federal Bureau of Land Management ("BLM"), an agency within the Department of the Interior, manages about 245 million acres in 12 western states. In several western states, federal lands managed by BLM and other federal agencies comprise the vast majority of the land area, making it

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[9] The Service's ESA Section 7 Consultation Handbook (March 1998) is available at: https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

very difficult to design a project that avoids interacting with federal lands. The siting and construction of new infrastructure, as well as the operation and maintenance of existing infrastructure, on federal lands are subject to rights-of-way ("ROW") obtained from the relevant federal agencies. *See* 43 U.S.C. § 1761. BLM has issued thousands of miles of ROWs for electricity transmission and distribution lines and currently manages almost 16,000 authorizations for electricity transmission and distribution facilities on federal lands.[10] The development and operation of renewable energy generation projects (wind and solar) on federal lands are subject to the same ROW requirements. The last decade in particular saw a number of commercial wind and solar energy projects being permitted and constructed on federal lands. EWAC members will continue to develop and improve electricity generation distribution and transmission facilities on federal lands in the future in order to ensure delivery of safe and reliable electric power across America.

Similar to section 404 permits, ROW grants are discretionary federal actions, and therefore trigger the action agency's obligation to consult with the Service under the ESA. 16 U.S.C. § 1536(a)(2). The action agency must evaluate the effects of granting the ROW on listed species and critical habitat. 50 C.F.R. § 402.02(c). If the ROW has the potential to affect listed species or critical habitat, the approval of the ROW is typically conditioned on a suite of measures, to be undertaken by the entities, that are designed to

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[10] John Ruhs, Acting Deputy Director for Operation, BLM, Statement before the Senate Committee on Energy and Natural Resources (September 19, 2017), available at: https://www.doi.gov/ocl/electric-infrastructure-vegetation-management.

minimize and mitigate for these effects. *See* 50 C.F.R. § 402.14(h) (biological opinions). These conservation measures may force redesign of a project and impose restrictions on ongoing operations and maintenance.

As previously noted, energy infrastructure projects, once established, are likely to remain on the landscape for several decades. In many instances, ESA-compliance is a continuous task and does not end after construction. ROWs and licenses may require renewal and modifications over the course of the infrastructure's lifespan, triggering evaluation of potential impacts on critical habitat designated after the initial ROW or license was approved. Existing federal authorizations also may include provisions requiring that consultation be re-initiated should new critical habitat be designated that may be affected by the authorized action. *See* 50 C.F.R. § 402.16(d) (consultation must be reinitiated where federal discretionary involvement or control has been retained and newly designated critical habitat may be affected). Thus, there are several ways that existing energy infrastructure could be affected by the designation of areas that cannot sustain a species as "critical habitat" for that species.

Critical habitat designations also can create conflicts with other federal standards. For example, the North American Electric Reliability Corporation ("NERC") requires vegetation management near regulated transmission lines to minimize risk of wildfires and outages caused by vegetation contacting or growing too close to lines. *See* NERC FAC-003-4, Transmission Vegetation Management (October 1,

2016).[11] For similar reasons, utilities also practice vegetation management near transmission and distribution lines that are not subject to NERC standards. These required and voluntary vegetation management activities may trigger ESA-related issues if the vegetation along part of a route is within designated critical habitat for a listed species. The activities also may have a federal nexus such as a requirement for a 404 permit or federal land management agency approval prior to conducting vegetation management. Desired vegetation conditions for the listed species also may conflict with NERC requirements in some cases. This could occur, for example, in riparian corridors where tall trees or shrubs could be an essential feature of critical habitat for a listed species, yet NERC standards may not allow taller vegetation near regulated lines. To resolve the conflict between ESA and NERC standards, the utility could be required to conduct surveys to demonstrate species absence prior to initiating work, comply with timing restrictions and provide offsetting mitigation, even though – under the criteria approved by the Fifth Circuit – the area is unoccupied and uninhabitable by the species in question.

Finally, even where an EWAC member's facility is located entirely on private land and does not require any federal permits (and therefore does not trigger the obligations of ESA section 7(a)(2)), financing can be adversely impacted if critical habitat occurs within or adjacent to the facility's footprint. Financiers will often impose more expensive terms for financing based on the existence of critical habitat because of the potential that a future federal authorization or permit

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[11] NERC standard FAC-003-4 is available at: https://www.nerc.com/pa/Stand/Reliability%20Standards/FAC-003-4.pdf.

could be needed, triggering ESA section 7 consultation, resulting in unanticipated costs.

Ultimately, the increased development and operating costs and the impacts of project delays connected to critical habitat for listed species are borne by electric power producers, consumers and taxpayers. Even entirely private projects suffer economic consequences from critical habitat, through adverse impacts on private financing.

C. Energy project developers seek to avoid or minimize the impact of new electricity generation, transmission, and distribution infrastructure within critical habitat.

In the interest of being good stewards of natural resources, and recognizing the additional costs and delays that are likely to result from siting projects in critical habitat, EWAC's members generally seek to avoid affecting critical habitat and to minimize those impacts that are unavoidable. Electricity generation locations and transmission routes are carefully examined, weighing a host of factors that routinely include avoiding and minimizing impacts to sensitive habitats and other natural resources. Indeed, EWAC members often go to great lengths to purposely route and site facilities in unoccupied (and uninhabitable) and often degraded areas, specifically to avoid conflicts with listed species and their habitat.

If routes or potential sites cannot avoid areas containing listed species or critical habitat, then potential impacts on those areas can be evaluated, minimized, and mitigated. During project design and ESA consultation the effects on critical habitat often are roughly estimated based on critical habitat maps.

This initial screening process is typically done at a coarse scale, particularly because electric transmission and distribution systems extend over great distances.

The wind energy industry developed, in coordination with the Service and other stakeholders, the Land-Based Wind Energy Guidelines ("Guidelines").[12] These Guidelines recommend a tiered approach to wind energy development starting first at landscape scale site-screening and proceeding with each tier to more site-specific data collection such as wildlife surveys. This process is designed to screen out potential sites where impacts on species of concern cannot be mitigated. *See* Guidelines at 9 (General Framework of Tiered Approach). Similarly, transmission and distribution companies follow internal siting procedures to identify and address potential impacts and to optimize the time and cost to build a route.

The result of the screening process is that EWAC members can and often do design and plan facilities to avoid or minimize impacts to areas known to support listed species, including occupied and unoccupied critical habitat. For example, a transmission line or wind or solar energy facility may be sited, when feasible, to avoid wooded areas that are suitable for listed bat species or riparian habitat that supports listed salamanders. Once decisions are made about routes and facility locations, it normally takes several years to acquire or access property, obtain permits, and construct the facilities. Many of the required steps for developing a project hinge on site-specific

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[12] U.S. Fish & Wildlife Service, Land-Based Wind Energy Guidelines (March 23, 2012), available at: https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf.

characteristics and land use requirements. Decisions regarding facility siting and route selection, including design changes, rerouting a segment or relocating facilities, become increasingly expensive and challenging to revisit as the multi-year development process proceeds.

D. Extending ESA "critical habitat" protection to lands that cannot sustain a listed species threatens to disrupt the development and operation of the nation's energy infrastructure.

If the Service can designate areas that are uninhabitable by a listed species as "critical habitat" subject to all of the protections of the ESA, that impacts the development, operation, and maintenance of the nation's energy infrastructure. Further, all of the care a project proponent takes to avoid sensitive habitats will be for naught if the Service can interject, at any point in the development timeline, a determination that lands that do not contain the physical or biological features necessary to sustain an ESA-listed species nevertheless are "unoccupied critical habitat" and subject to the full protections afforded by the ESA.

Similar pressures come to bear on operating facilities. The designation of "unoccupied critical habitat" within the footprint of an existing wind or solar energy facility or overlapping the route of existing transmission or distribution lines is likely to impose unanticipated costs and may force changes in operation and maintenance practices. In addition to the impact on normal operations of the facilities, it is routine for changes to be made to existing facilities during their long operating lives, and those changes can trigger the same federal nexus as a new project. Designating uninhabitable areas as "critical habitat" for a listed

species can disrupt those projects in a myriad of ways. A project developer or facility operator simply cannot anticipate or develop contingencies for the entirely unpredictable risk that land which is not habitable by a listed species can nevertheless be declared by the Service to be "critical habitat," with attendant regulatory consequences.

Returning to the example of the Corps-issued NWP discussed in Section II.B. above, if the Service can designate unsuitable, and indeed uninhabitable, land as critical habitat, then the frequency with which the notification requirements of the NWP's General Condition 18 are triggered will increase drastically. Furthermore, these areas would have no distinguishable characteristics indicating they may support a particular species, making it impossible for project proponents to plan ahead to avoid certain areas since anything could be fair game for a critical habitat designation. For example, consider a wind energy project with a layout carefully designed to avoid woodland habitat that may be suitable for listed bat species and has access road crossings requiring NWP authorization from the Corps. If the project is sited on former woodlands that were logged long ago and converted to other uses, it would suddenly be at risk if the Service were allowed to designate its site as "unoccupied critical habitat" on the premise that the land could one day revert back to forest and grow into suitable bat habitat. Under this scenario, even though the stream crossing regulated by the Corps is outside the newly designated critical habitat, if the project has not yet begun construction then the Corps could be forced to reinitiate consultation, as the Service's expansive review could extend to effects on the former woodlands where turbines will be located. *See* Section 7 Consultation Handbook at 4-17 – 4-18; 50 C.F.R.

§ 402.16(d) (consultation must be reinitiated where federal discretionary involvement or control has been retained and newly designated critical habitat may be affected).

Or consider the transmission line route that carefully avoided salamander habitat on federal lands. If the Service later designated critical habitat near streams that have been converted from native vegetation to agriculture but could, in theory, one day be restored to support listed salamanders, the route could suddenly be subject to section 7(a)(2) requirements for any subsequent discretionary federal actions.

In both cases, infrastructure that had been sited with the specific objective of avoiding sensitive habitat suddenly and unexpectedly would overlap critical habitat. There is no way the project developer could anticipate that this could or would occur, potentially years into the development process or after the project has been constructed and begun operating. No preconstruction survey could reliably identify or quantify this risk and any attempt to do so would be a highly speculative, likely inaccurate and costly guess.

It becomes that much harder (indeed, nearly impossible) for all parties to evaluate future financial risk if the Service has the power to designate land where a project has been proposed or that is occupied by an existing facility as critical habitat even though the land lacks the physical or biological features needed to sustain the listed species. Project developers would no longer be assured of any benefit from avoiding the habitat of listed species in favor of uninhabited and uninhabitable areas. EWAC members simply could not factor such possibilities into their siting and routing decisions and it would be extremely difficult for them to budget for these uncertainties. This affects

not only the potential cost of project development, but also the designation of critical habitat affecting an existing project also can be expected to increase its operating costs. As noted in prior sections, these increased costs are likely to be passed on to electricity consumers in the form of higher rates, although for electrical generation projects that are operating under long-term power purchase agreements the costs may be unrecoverable by the facility owner.

Moreover, as the Service and the Fifth Circuit recognized, the designation of critical habitat could decrease the asset value of any affected electrical infrastructure, due to the stigma of the facility having new, and likely undefined, obligations due to the new critical habitat designation. *See* Pet. App. 13a ("a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions."). It could devalue properties where assets have been retired or are proposed for retirement, as well as land that was purchased in anticipation of future needs and is offered for sale when plans change.

These outcomes are unreasonable, as they will cause delay and increase costs and could prevent projects from being built or maintenance of existing infrastructure, disrupting access to reliable and affordable electric power, all while providing little or no benefit for listed species.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

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In the Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL LAW PROFESSORS IN SUPPORT OF FEDERAL RESPONDENTS AND INTERVENOR-RESPONDENTS

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BRIEF OF *AMICI CURIAE* ENVIRONMENTAL LAW PROFESSORS IN SUPPORT OF FEDERAL RESPONDENTS AND INTERVENOR-RESPONDENTS

The undersigned environmental law professors respectfully submit this brief as *amici curiae* in support of Federal Respondents and Intervenor-Respondents.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are twenty-six professors of law who research, teach, and write about environmental law, natural resources law, property law, and administrative law. *Amici* have particular expertise regarding the history, purpose, procedures, and application of the substantive standards of the Endangered Species Act (ESA), the nation's premier wildlife conservation law. This case concerns a question of first impression that goes to the heart of the conservation provisions of the ESA, namely whether the law protects the historic but currently unoccupied habitat of an endangered species (the dusky gopher frog) that has been determined by the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, all appropriate parties have filed letters granting blanket consent to the filing of *amici curiae* briefs.

Secretary of the Interior, based on the best scientific data available, to be "essential for the conservation" of the species. The answer to this question could have profound consequences for a growing list of imperiled species whose historic habitat has been greatly reduced and degraded by the appropriation of land and natural resources to serve human needs.

Amici wish to provide the Court with their independent views on how this important provision of the ESA should be interpreted and what role the courts should play in reviewing the exercise of the discretionary authority that Congress granted to the Secretary. A list of the *amici* and their school affiliations is provided in the Appendix.

STATEMENT OF THE CASE

The International Union for the Conservation of Nature ranks the dusky gopher frog (*Rana sevosa*) among the top 100 most threatened species in the world. Live Science Staff, ***100 Most Threatened Species***, Live Science (Sept. 11, 2012, 9:56 AM), https://www.livescience.com/31743-100-most-threatened-species.html. This critically endangered amphibian was found historically across parts of southwest Alabama, southern Mississippi, and southeast Louisiana. Final Rule To List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,994 (Dec. 4, 2001) (to be codified at 50

C.F.R. pt. 17).[2] But the current total population of dusky gopher frogs in the wild is less than 100 individuals living in three fragmented locations in Mississippi. Pet. App. 108a n.28; Dusky Gopher Frog Recovery Team & Mississippi Field Office U.S. Fish & Wildlife Service, *Dusky Gopher Frog (Rana sevosa) Recovery Plan* (July 23, 2015), at iv [hereinafter "Recovery Plan"]. Habitat loss and degradation threaten the survival and recovery of the dusky gopher frog. Recovery Plan, *supra*, at iv. Less than three percent of the old-growth longleaf pine-savanna upon which the dusky gopher frog and other endemic species depend remains. Lewis Thomas, *Restoring a Disappearing Ecosystem: the Longleaf Pine Savanna*, U.S. Dep't of Agric. Forest Serv. (2013). Thus, as the record demonstrates, recovery of the dusky gopher frog will not be possible "without the establishment of additional breeding populations." Final Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,117, 35,124 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter "Final Designation"].

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[2] At the time of listing, the species was known as the Mississippi gopher frog (*Rana capito sevosa*), a distinct population segment of the dusky gopher frog (*Rana capito*). Final Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,117, 35,118 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17). The species has since been recognized as its own species by the herpetological scientific community, and its scientific name has been changed to *Rana sevosa*. *Id.*

To comply with its obligations under the ESA to promote the recovery of dusky gopher frogs, the U.S. Fish and Wildlife Service (FWS) initially proposed designating eleven units of critical habitat for the species in Mississippi. Proposed Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387 (June 3, 2010) (to be codified at 50 C.F.R. pt. 17). Pursuant to its statutory duty to use the "best scientific data available," 16 U.S.C. § 1533(b)(2), and as required by its peer review policy, FWS submitted the proposed critical habitat designation to relevant outside scientific experts for their evaluation. Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities, 59 Fed. Reg. 34,270 (July 1, 1994); Final Designation, 77 Fed. Reg. at 35,119. These independent experts deemed the proposed designation insufficient for the conservation of the dusky gopher frog, stating that "additional habitat should be considered throughout the historic range of the species." Final Designation, 77 Fed. Reg. at 35,119. Specifically, they recommended including habitat in Louisiana to support the continued existence and recovery of the frog. *Id.* Consistent with the best scientific data available, FWS expanded its critical habitat designation to include historic, but currently unoccupied habitat outside of Mississippi in St. Tammany Parish, Louisiana. *Id.* at 35,124.

FWS determined that the five ephemeral ponds located on the St. Tammany Parish tract (Unit 1) provide "breeding habitat that in its totality is not

known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* According to scientific experts, Unit 1's landscape structure of multiple breeding ponds interconnected by forested upland habitat mimics the natural, historic landscape of dusky gopher frogs that is capable of supporting a viable population. *See* Recovery Plan, *supra*, at 13. The Secretary further determined that maintaining the five seasonally flooded ponds within this area as suitable habitat into which dusky gopher frogs could be translocated is "essential to decrease the risk of extinction of the species resulting from [wildfire, disease, and other] stochastic events and provide for the species' eventual recovery." Final Designation, 77 Fed. Reg. at 35,133. Unit 1 also serves as a refuge for the frog from "environmental threats or catastrophic events," including climate change, which will "undoubtedly affect [frogs] in the coming decades."[3] *Id.* at 35,124.

Unit 1 consists of a complex of five ephemeral ponds and their associated uplands, which as late as 1965 hosted at least two breeding sites for the last known population of the dusky gopher frog outside

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[3] Amphibians are among the species most at risk from climate change because they are susceptible to desiccation, or drying out. Final Designation, 77 Fed. Reg. at 35,124. Climate change may impact the amount or frequency of precipitation, causing irregular and drier conditions. *Id.* This is particularly significant for the dusky gopher frog, which relies on seasonally flooded ponds sourced by heavy winter rain events for breeding. *Id.* at 35,131.

Mississippi. *Id.* at 35,315. Ephemeral ponds suitable for dusky gopher frog breeding cannot be replicated. *Id.* at 35,123. Although artificial, man-made ponds have been successfully used for breeding other gopher frog species, dusky gopher frogs require ponds with more specific features for breeding, namely "grassy, acidic, isolated, ephemeral, depressional wetlands" (or seasonal ponds) lacking predaceous fish. *Id.* at 35,123; Recovery Plan, *supra*, at iv. Ponds must "hold water long enough to allow for tadpole development and metamorphosis, but if they hold water too long they become permanent ponds and no longer have value for [dusky gopher frogs]." Final Designation, 77 Fed. Reg. at 35,123. Despite FWS's ongoing efforts for over a decade at the DeSoto National Forest, it has not established a successful breeding site due to the challenges of creating a functional ephemeral wetland (or seasonal pond) in the landscape. *Id.* Re-creating elsewhere a site similar to Unit 1 that contains not one, but five functional, suitable (and rare) ephemeral breeding ponds in a natural landscape within a timeframe that would "provide near-term conservation benefits to the dusky gopher frog" is *extremely* unlikely, if not impossible. *Id.*

In addition, the surrounding marginally suitable upland habitat of Unit 1 can be successfully restored "with reasonable effort" to provide nonbreeding habitat for dusky gopher frogs. *Id.* at 35,135. FWS has identified a number of voluntary conservation incentives for private landowners to achieve habitat restoration in Unit 1, such as habitat

conservation plans that incorporate the landowners' timber management goals and private landowner funding for habitat management through the U.S. Department of Agriculture's Healthy Forests Initiative. *Id.*

Based on the best scientific data available, the Secretary determined that the presence of ephemeral ponds is essential to the recovery of the species because of "the low number of remaining populations and severely restricted range of the [frogs]" and the restorable nature of the nonbreeding habitat. *Id.* at 35,133. By providing breeding habitat capable of supporting multiple local populations of the frog at a geographically distant location from living populations, Unit 1 increases the frog's resiliency to extinction and its ability to recover, which the Secretary has determined is "essential for the conservation of the [species]." *Id.* at 35,130.

As the Secretary recognized, designation of unoccupied habitat, even though it may not be currently suitable, will become increasingly important to the survival of the growing list of species vulnerable to climate change. *Id.* at 35,124.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly upheld the Secretary's designation of the St. Tammany Parish tract (Unit 1) as critical habitat for the dusky gopher frog. To advance the ESA's goals of species survival

and recovery, Congress explicitly gave the Secretary broad discretion to designate as critical habitat areas that are unoccupied where the Secretary determines "that such areas are essential for the conservation" of the species. 16 U.S.C. § 1532(5)(A)(ii). The question whether designation of such habitat has the potential to serve the recovery goals for a particular species is a matter within the sound expertise of the Secretary.

Here, the Secretary reasonably interpreted the ESA when he found that Unit 1—an area that the frog previously occupied and that continues to contain rare ephemeral ponds suitable for the frog's breeding habitat—is "essential for the conservation" of the species. Accordingly, and based on the unanimous recommendation of the scientific peer review panel, the Secretary properly designated the area as critical habitat. The text, structure, purpose, and legislative history of the ESA support the Secretary's interpretation and critical habitat designation.

Contrary to Petitioner's argument and the views of the dissent below, the plain text of the ESA does not include a "habitability" requirement. Rather, Congress made a conscious decision to differentiate between occupied and unoccupied habitat, making it clear that unoccupied habitat need not contain all of the "physical or biological features" required for immediate occupancy. *See id.* § 1532(5)(A)(i), (ii).

The structure of the Act, along with its broad remedial purpose of species recovery, supports the Secretary's interpretation of "essential for the conservation" of the species. The ESA defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided pursuant to [the Act] are no longer necessary." *Id.* § 1532(3). Another provision requires the Secretary to develop and implement recovery plans "for the conservation and survival of endangered species." *Id.* § 1533(f)(1). These provisions—read together against the backdrop of a statutory scheme aimed at species recovery—support the interpretation that the Secretary may designate unoccupied habitat as critical habitat even if, as here, it has been altered by human activities and requires substantial restoration in order to fully meet the physical and biological needs of the species. Because the land at issue in this case offers the only viable option for species recovery, prohibiting the Secretary from designating that land would be contrary to the Act's structure and purpose.

The legislative history confirms the reasonableness of the Secretary's interpretation and contradicts Petitioner's reading. In the 1978 amendments to the Act, Congress explicitly rejected language that would have imposed temporal and habitability requirements on the designation of unoccupied habitat. This history further confirms that Congress intended to give the Secretary broad

authority to designate unoccupied critical habitat that might require the reintroduction of species unable to reach it on their own.

Contrary to Petitioner's suggestion, the interpretation of the ESA that *amici* support would not grant *carte blanche* authority to the Secretary to designate anything and everything as critical habitat. The presence of a rare, virtually impossible to reproduce complex of breeding ponds—the last remaining within the historic range of the frog outside of Mississippi—is what renders the protection of Unit 1 "essential for the conservation" of the frog and justifies the Secretary's critical habitat designation.

The Fifth Circuit also correctly declined to review the Secretary's decision *not* to exercise his discretion to exclude an area from critical habitat designation. The text of section 4(b)(2) limits the Secretary's discretion *to exclude* an area from designation in certain circumstances (i.e. where the benefits of exclusion do not outweigh the benefits of inclusion or where extinction would result from exclusion). A decision *to exclude*—which is equivalent to a decision not to designate critical habitat—is, therefore, properly reviewable.

However, the statute is silent with respect to decisions *not to exclude*. Section 4(b)(2) contains no "judicially manageable standards" limiting the Secretary's exercise of discretionary authority not to exclude. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Thus, a decision by the Secretary *not to exclude* an area from designation is unreviewable because it is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

ARGUMENT

I. The Secretary's Determination That Protection of Unit 1 Is "Essential for the Conservation" of the Dusky Gopher Frog Is Entitled to Deference Because It Is Supported by the Best Scientific Data Available as well as the Text, Structure, Purpose, and Legislative History of the Endangered Species Act.

The question presented is whether the Secretary exceeded the scope of his statutory authority in designating Unit 1 as critical habitat even though it currently lacks some of the physical and biological features required to fully support the gopher frog. The question ultimately turns on the meaning of the phrase "essential for the conservation of the species." Congress has not spoken directly to the precise question at issue, namely whether unoccupied habitat must be immediately "habitable" in order to be declared "essential for the conservation" of the dusky gopher frog. Nevertheless, it is clear from the text, structure, purpose, and history of the ESA, as well as the comprehensive administrative record developed in this case, that the Secretary

properly exercised the broad discretion Congress gave him to use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

Where a statute "is silent or ambiguous" with respect to a specific term, an agency's reasonable interpretation of that term is entitled to substantial deference. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (observing that Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). When Congress enacted the ESA, 16 U.S.C. §§ 1531–44, it "delegated broad administrative and interpretive power to the Secretary," as necessary to execute the complex policy decisions required under the Act. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 708 (1995) (noting that Congress gave Secretary "latitude . . . in enforcing the statute"). Where Congress has "entrusted the Secretary with broad discretion," the Court is "especially reluctant to substitute [its] views" for those of the Secretary. *Id.* Importantly, the ESA need not "compel[] the Secretary's interpretation"; it is sufficient that the interpretation is reasonable and that "Congress did not unambiguously manifest its intent to adopt" an opposing view. *Id.* at 703.

In section 4 of the ESA, Congress directed the Secretary, "to the maximum extent prudent and determinable," to designate critical habitat to protect and recover imperiled species. 16 U.S.C. § 1533(a)(3)(A). Habitat loss and degradation are the leading causes of species endangerment in North America, and threats to habitat affect more than 85% of listed species under the ESA. Amy N. Hagen & Karen E. Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*, 20 Conservation Biology 399, 400 (2006). Congress highlighted the importance of habitat conservation in the ESA's stated purpose: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such [species]." 16 U.S.C. § 1531(b). Congress further defined "conservation" as "the use of *all* methods and procedures" necessary to recover listed species, including habitat acquisition and maintenance. *Id.* § 1532(3) (emphasis added). To advance the Act's species survival and recovery goals, Congress entrusted the Secretary with broad discretion to designate as critical habitat both occupied and unoccupied areas that the Secretary determines are "essential for the conservation of the species." *Id.* § 1532(5)(A)(i), (ii).

In this case, the Secretary reasonably concluded that unoccupied habitat includes areas where the endangered species does not currently live, but which could be acquired or improved to provide

for the species' biological and physical needs. Indeed, the Secretary's decision was driven in large part by the unanimous recommendation of the scientific peer review panel that designation of critical habitat outside Mississippi was absolutely essential to recovery of the species. Under these circumstances, the Secretary's determination was eminently reasonable and consistent with the ESA's species recovery goals. *Cf. Sweet Home*, 515 U.S. at 708 (explaining that judicial deference is particularly apt where Secretary's interpretation is supported by "the text, structure, and legislative history of the ESA"). As in *Sweet Home*, and with even stronger factual support in this case, the text of the ESA as well as its structure, purpose, and legislative history demonstrate that the Secretary's interpretation was reasonable. *Id.* at 697.

A. The text of the ESA indicates that Congress consciously chose to authorize the Secretary to designate unoccupied habitat that is essential to the conservation of the species even though it may lack all of the "physical or biological features" required for immediate occupancy.

"When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671

(2008) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)); *see, e.g., Dep't of Treasury, IRS v. Fed. Labor Relations Auth.*, 494 U.S. 922, 932 (1990) ("A statute that in one section refers to 'law, rule or regulation,' and in another section to only 'laws' cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places."). This is particularly true where Congress has included limiting language in one provision but not in another adjacent or nearby provision in the same statutory section. *See United States v. Gonzales*, 520 U.S. 1, 5 (1990) (finding it "significant" that Congress explicitly limited scope of "any crime" to only federal crimes but placed no similar limiting language on "any other term of imprisonment," which appears only two sentences later in statute); *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (observing that "[t]he interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force" where relevant statutory provisions are "in close proximity"); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341–42 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

When Congress amended the ESA in 1978 to define "critical habitat," it included two distinct

statutory provisions, one for occupied habitat and one for unoccupied habitat:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Subsection (i) authorizes the Secretary to designate areas "within the geographical area occupied by the species," if those areas contain the "*physical or biological features* . . . essential to the conservation of the species." *Id.* § 1532(5)(A)(i) (emphasis added). Subsection (ii), on the other hand, authorizes the Secretary to designate areas "outside the geographical area occupied by the species," if he determines those areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). While the designated areas for both types of critical

habitat must be "essential for the conservation of the species," Congress included the limiting terms "physical or biological features" only in subsection (i).

Congress acted "intentionally and purposely" by including the terms "physical or biological features" in subsection (i) and omitting them from subsection (ii), two statutory provisions that are closely related in subject matter and proximity. *Allison Engine Co.*, 553 U.S. at 671 (quoting *Barnhart*, 534 U.S. at 452); *MacLean*, 135 S. Ct. at 919. The text, therefore, signals Congress' intent to limit the Secretary's authority to designate *occupied* critical habitat to areas with *physical or biological features* that are "essential to the conservation of the species," but not the Secretary's authority to designate *unoccupied* critical habitat. In doing so, Congress must have understood that there would be situations where the Secretary would need to designate unoccupied critical habitat that might not contain all the required "physical or biological features" at the time of designation.

Petitioner erroneously reads section 3(5)(A)(ii) to state that Unit 1 must, at present or in the foreseeable future, contain all the physical or biological features necessary for occupancy by the dusky gopher frog. *See* Pet. Brief at 27. This reading would require the Court to ignore the text of the statute and Congress' clear intent to omit this requirement for unoccupied critical habitat designations. *See Dean v. United States*, 556 U.S.

568, 572 (2009) (explaining that courts "ordinarily resist reading words or elements into a statute that do not appear on its face" (quotation omitted)).

B. The structure of the ESA shows that Congress intended that critical habitat designations be used to conserve areas that are currently unoccupied but essential to achieve species recovery.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted); *see also U. S. Ass'n of Texas v. Timber of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). The term "essential" is part of the phrase "essential for the conservation of the species," as well as the larger statutory scheme aimed at species recovery, and the term must be read in that context.

The statute expressly defines the term "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point

at which the measures provided pursuant to [the Act] are no longer necessary." 16 U.S.C. § 1532(3). FWS regulations similarly define "recovery" as the "improvement in the status of listed species to the point at which listing is no longer appropriate under . . . the Act." 50 C.F.R. § 402.02. Thus, the phrase "essential for the conservation of the species" in section 3(5)(A)(ii) authorizes the Secretary to designate as critical habitat areas that are necessary to achieve species recovery. A reading of section 3(5)(A)(ii) requiring that unoccupied critical habitat be presently habitable would unreasonably constrain the Secretary's authority to use "all methods necessary" to achieve species recovery and frustrate Congress' goals in enacting the ESA.

The objectives of the ESA are two-fold: species survival and species recovery. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) ("Congress intended that conservation and survival be two different (though complementary) goals of the ESA."); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) ("[T]he objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status."). Listing a species as endangered or threatened is the critical first step in preventing the extinction of the species; indeed, 98% of listed species survive. FWS, *Defining Success Under the Endangered Species Act*, Endangered Species Bulletin (July 12, 2013), https://www.fws.gov/endangered/news/episodes/bu-

04-2013/coverstory/index.html. Critical habitat designation, however, is the chief mechanism to achieve *recovery* of imperiled species. *Gifford Pinchot*, 378 F.3d at 1070. Species recovery requires future expansion into new territory to support a larger, recovered population, thereby necessitating the designation of geographically distant or presently unsuitable lands as critical habitat. Michael J. Bean, *The Endangered Species Act: Science, Policy, and Politics*, 1162 Ann. N.Y. Acad. Sci. 369, 378 (2009). Because Congress authorized the Secretary to "use all methods and procedures which are necessary" to *recover* a species—not "merely to forestall extinction" of the species, *Gifford Pinchot*, 378 F.3d at 1070—the Secretary may designate unoccupied land as critical habitat even if it is not, at present, actively supporting the species.

The ESA's recovery objective is further carried out by the requirement that the Secretary develop and implement recovery plans "for the conservation and survival of endangered and threatened species." 16 U.S.C. § 1533(f)(1). The Act requires that the Secretary incorporate into each recovery plan "site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species" and "objective, measureable criteria which, when met, would result in a determination . . . that the species be removed from the list." *Id.* § 1533(f)(1)(B)(ii). This section reinforces the ultimate purpose of the statute: to achieve species recovery through the use of

conservation measures, including habitat restoration. Recovery plans implemented by FWS, including the approved recovery plan for the dusky gopher frog, frequently include habitat restoration of unoccupied, degraded habitat as a key component of achieving species recovery via increasing habitat availability for listed species.[4] Without the ability to consider marginally suitable and currently unsuitable land areas as needed for species recovery, recovery plans could not achieve their purpose of species conservation. Similarly, the Secretary has reasonably interpreted "essential" unoccupied critical habitat to include potentially suitable areas to achieve species recovery via conservation measures, such as habitat acquisition and maintenance.

If suitable habitat conditions were available to the dusky gopher frog, the species' population would not have diminished to fewer than 100 individuals. Pet. App. 108a n.28. Where, as here, "the biggest threat to critically endangered species is the destruction of habitat, . . . it does not make sense to hamstring [the Secretary's] efforts to conserve the

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[4] *See, e.g.*, Recovery Plan, *supra*; FWS, *Devils River Minnow (Dionda diaboli) Recovery Plan* (Aug. 10, 2005); Kathryn Kennedy & Jackie Poole, *Chisos Mountain Hedgehog Cactus (Echinocereus chisoensis var. chisoensis) Recovery Plan* (Dec. 8, 1993); FWS, *Recovery Plan for the Alabama Beach Mouse (Peromyscus polionotus ammobates), Perido Key Beach Mouse (P. p. trisslylepsis), and Choctawhatchee Beach Mouse (P. p. allpphrys)* (Aug. 12, 1987); FWS, *Coachella Valley Fringe-Toed Lizard (Uma inornata) Recovery Plan* (Sept. 11, 1985).

species by limiting the designation of habitat to only those areas that contain optimal conditions for the species." *Id.* (quoting FWS). Unoccupied, marginally suitable or unsuitable habitat that can be made suitable plays a key role in recovering imperiled species when optimal habitat areas do not exist because in order to recover, species must be able to expand into new habitat areas. Bean, *supra*, at 378. Recognizing this, the ESA authorizes the Secretary to consider suboptimal areas that can be restored to provide vital additional habitat when the Secretary determines that such habitat is essential for the conservation of the species.[5]

C. The broad remedial purpose of the ESA supports the Secretary's interpretation of "essential for the conservation of the species."

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The Act further directs agencies "to use all methods and procedures which are necessary" to preserve endangered species.

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[5] *See* FWS, Final Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,253–54 (Oct. 12, 2006) (to be codified at 50 C.F.R. pt. 17) (finding unoccupied habitat essential to the conservation of the species even though the habitat did not currently contain all physical or biological features for the species' needs and designating such restorable unoccupied habitat as critical).

Id. § 1532(3). This Court has examined the text, structure, purpose, and history of the Act to conclude that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). The Court noted that "the institutionalization of caution lies at the heart" of the statute. *Id.* at 153. This goal of species recovery, observed the Court, "is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.*; *see also Sierra Club*, 245 F.3d at 438 ("[T]he objective of the ESA is to enable listed species not to merely survive, but to *recover* from their endangered of threatened status." (emphasis added)).

Consistent with the ESA's recovery goals, this Court has affirmed the Secretary's authority to interpret the general language of the statute to include habitat protection. In *Sweet Home*, for example, the Court upheld the Secretary's interpretation of "harm" in section 3 of the ESA as including "habitat modification." 515 U.S. at 695. In doing so, it rejected the lower court's conclusion that the term harm "must refer to the direct application of force because the words around it do." *Id.* at 701. The Court looked to the broad purposes of the Act to uphold the Secretary's interpretation that the word harm should include indirect threats to species from habitat destruction. *Id.* The Court noted that the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," *id.* at 699 (quoting *Hill*, 437 U.S. at 180),

and that the 1973 enactment contained a "sweeping prohibition against the taking of endangered species." *Id.* The Court concluded: "Given Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife, the Secretary's definition of 'harm' is reasonable." *Id.* at 700.

Recognizing the "considerable breadth" with which this Court has treated the ESA's terms, lower courts have declined to add words like "habitable" that would limit the Secretary's authority to designate unoccupied habitat as essential to the conservation of a species. *See, e.g.*, *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (refusing to read "habitable" into provision allowing FWS to designate unoccupied land as critical habitat because doing so would contravene plain text of ESA, "which requires [FWS] to show the area is 'essential' without defining that term as 'habitable'"); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1166-67 (9th Cir. 2010) (refusing to limit occupied habitat to areas where species actually reside because allowing FWS "to designate as occupied habitat where the species is likely to be found promotes the ESA's conservation goals and comports with the ESA's policy of institutionalized caution" (internal quotation marks omitted)); *Sierra Club*, 245 F.3d at 438 (refusing to limit designations of unoccupied critical habitat to only endangered species because unoccupied critical habitat should be designated for both threatened and endangered species where it is necessary to achieve species recovery).

Where, as in the case of the dusky gopher frog, the species' conservation depends on land that, while not presently suitable, is the *only* viable option for bringing that species back from the brink of extinction, the Secretary must be able to designate it as critical habitat. If the Secretary is unable to do so, the dusky gopher frog, and other species like it, will be limited to small patches of fragmented habitat with little or no chance for survival and eventual recovery.

D. The legislative history of the ESA confirms the Secretary's interpretation that critical habitat includes unoccupied areas that may require restoration.

When Congress enacted the ESA in 1973, it did so to "widen the protection which can be provided to endangered species." H.R. Rep. No. 93-412 from the Committee on Merchant Marine and Fisheries, accompanying H.R. 37, at 1, reprinted in *A Legislative History of the ESA* at 140. In 1973, and during subsequent amendments and reauthorizations of the ESA, a significant focus of these "widened" protections was critical habitat. *See, e.g.*, H.R. 37, at 5 (1973), reprinted in *A Legislative History of the ESA* at 144 ("The protection of habitat of endangered species is clearly a critical function of any legislation in this area."); 119 Cong. Rec. 25, 669 (1973), reprinted in *A Legislative History of the ESA* at 358

(finding land acquisition essential to success of ESA because "most endangered species are threatened primarily by the destruction of their natural habitats"); H.R. Rep. No. 94-887 (1976), reprinted in *A Legislative History of the ESA at* 497 ("[T]he ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitats."); House Consideration & Passage of H.R. 8092 (1976), reprinted in *A Legislative History of the ESA* at 506 ("The listing process is meaningless unless the Departments take the appropriate steps to protect species' habitats.").

When Congress passed Senate Bill 2899 in 1978, it expressly rejected proposed amendments that would have restricted the definition of unoccupied critical habitat. Specifically, Congress considered and rejected two requirements: (1) that an unoccupied area be "one into which the species can be expected to expand naturally," Senate Consideration & Passage of S. 2899, with amendments, Congressional Record, July 18, 1978, reprinted in *A Legislative History of the ESA* at 1065, and (2) that an unoccupied area be one that is "periodically inhabited by the species," House Consideration & Passage of S. 2899, with amendment, in lieu of H. R. 14104, Congressional Record, Oct. 14, 1978, reprinted in *A Legislative History of the ESA* at 879. In doing so, Congress signaled its intent to give the Secretary broad authority to designate unoccupied critical habitat limited only by the requirement that the areas be "essential for the conservation of the species" and not

by any temporal or habitability requirements. 16 U.S.C. § 1532(5)(A)(ii); *see Hill*, 437 U.S. at 184 ("Agencies in particular are directed by §§ 2(c) and 3(2) of the Act to 'use . . . *all methods* and procedures which are necessary' to preserve endangered species." (emphasis in original) (citations omitted)).

Petitioner's reading of section 3(5)(A)(ii) would prohibit the Secretary from designating habitat deemed necessary for recovery by the best scientific data available merely because it does not currently—but could in the future—support a population of dusky gopher frogs. This contradicts the Act's legislative history, which reveals that Congress rejected language that would have imposed temporal and habitability requirements restricting the Secretary's broad authority to designate unoccupied critical habitat.

II. Conservation of Unoccupied Habitat, Even If Suboptimal, Is Essential for Recovering Species Threatened by Climate Change.

Scientists, legal professionals, and policymakers have recognized the world is changing at a sufficiently rapid pace due to climate change and that a static conservation policy cannot adequately respond to this change. *See* Holly Doremus, *The Endangered Species Act: Static Law Meets Dynamic World*, 32 Wash. U. J.L. & Pol'y 175, 176 (2011).

Species' range shifts and behavioral changes based on climate change impacts are well-documented. Camille Parmesan & Gary Yohe, *A Globally Coherent Fingerprint of Climate Change Impacts Across Natural Systems*, 421 Nature 37, 38–39 (2003). Rising temperatures are forcing many endangered and threatened species to migrate away from their home ranges. *See* J.B. Ruhl, *Climate Change and the Endangered Species Act*, 88 B.U. L. Rev. 1, 22 (2008). Critical habitat designations must be able to respond to the increasing threats listed species face, and future listed species will face, as a result of climate change. *See* Doremus, *supra*, at 215 (asserting that ESA should take into account often unstable course of nature).

The Secretary addressed threats posed by climate change for dusky gopher frogs by designating sites at a sufficient distance from the frogs' current occupied habitat to serve as refuges, if the sites presently occupied are "negatively affected by environmental threats or catastrophic events." Final Designation, 77 Fed. Reg. at 35,124. Due to habitat fragmentation and the frogs' "limited natural ability to move through the landscape," the Secretary identified dusky gopher frogs as particularly "susceptible to the effects of rapid climate change" and determined that "[t]he designation of critical habitat, and the creation of new populations of dusky gopher frogs through reintroductions, should give the species better odds of survival and recovery given the threats posed by climate change." *Id.* Thus, the

Secretary exercised his authority to designate unoccupied critical habitat to protect and recover this imperiled species. Without the ability to designate unoccupied, presently unsuitable areas as critical, the Secretary would lack the tools to protect sufficient habitat for the recovery of dusky gopher frogs and similarly imperiled species.

III. The Secretary's Decision Not to Exclude an Area from Critical Habitat Designation Is Judicially Unreviewable.

Although the Administrative Procedure Act (APA) embodies a "basic presumption of judicial review," *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), section 701(a)(2) of the APA "bars judicial review of agency action when the matter in dispute has been 'committed to agency discretion by law,'" *Drake v. F.A.A.*, 291 F.3d 59, 70 (D.C. Cir. 2002) (quoting 5 U.S.C. § 701(a)(2)). This "very narrow exception," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), applies where the statute provides "no judicially manageable standards . . . for judging how and when an agency should exercise its discretion," *Heckler*, 470 U.S. at 830; *see also Overton Park*, 401 U.S. at 410 (holding that an action is committed to agency discretion by law "where

statutes are drawn in such broad terms that in a given case there is no law to apply" (citation omitted)).

A. Section 4(b)(2) establishes no "judicially manageable standards" by which to judge the Secretary's discretionary decision not to exclude an area from critical habitat designation.

A plain reading of section 4(b)(2) shows that, while a decision *to exclude* an area from designation is reviewable, a decision *not to exclude* is not. *See Webster v. Doe*, 486 U.S. 592, 600 (1988) (looking first to the language of the provision at issue to determine whether a judicially manageable standard existed). The first sentence of section 4(b)(2) provides that "[t]he Secretary *shall* designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). The second sentence states that

> [t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure

> to designate such area as critical habitat will result in the extinction of the species concerned.

Id. (emphasis added).

Congress articulated judicially manageable standards in the second sentence of section 4(b)(2) by conveying that the Secretary has the discretion to exclude areas from designation after following the statute's specified process. *See* Pet. App. 34a–35a. The second sentence *prohibits* exclusion in certain circumstances: if the Secretary determines that the benefits of exclusion do not outweigh the benefits of inclusion, or if extinction would result from exclusion. *See Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1033 (9th Cir. 2015) ("The term 'outweigh' in the second sentence limits the agency's discretion to exclude areas from designation."). Because the statute bars the Secretary from excluding areas in these defined instances, secretarial decisions *to exclude* areas from designation are reviewable.

Moreover, a decision to exclude "otherwise essential habitat is . . . properly reviewable because it is equivalent to a decision not to designate critical habitat"—an action that section 4(b)(2) obligates the Secretary to take. *Bear Valley Mut. Water Co.*, 790 F.3d at 990.

In contrast, section 4(b)(2) does not articulate any judicially manageable standards "governing when the [Secretary] *must* exclude an area from designation." Pet. App. 35a (emphasis in original). The permissive language of the second sentence of section 4(b)(2) gives the Secretary the discretion to prioritize conservation when making an exclusion decision.

Even if the Secretary determined that the economic benefits of exclusion did outweigh the benefits of inclusion, the statute would not obligate the agency to exclude the area. *See* 16 U.S.C. § 1533(b)(2); *cf.* Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 196 (2004) ("Rather than mandating an approach that would ensure that critical habitat was never designated when economic costs outweighed benefits, Congress sought only to give the Secretary the flexibility to deviate from a purely biological approach when she deemed it appropriate."). Under no circumstances does the second sentence obligate the Secretary to exclude an area from designation.[6] *See* Pet. App. 34a–35a; *see*

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[6] Additionally, as the Ninth and Fifth Circuits have recognized, the agency has the discretion to choose its methodology when making decisions pursuant to section 4(b)(2). *See Bldg. Indus. Ass'n*, 792 F.3d at 1032–33 ("[A]fter the agency considers economic impact, the entire exclusionary process is discretionary and there is no particular methodology that the agency must follow"); Pet. App. 36a ("[Section 4(b)(2)] does not require a

also Bear Valley Mut. Water Co., 790 F.3d at 990. The ESA's "broad purpose to protect endangered and threatened wildlife" supports this plain reading of section 4(b)(2). *See Sweet Home*, 515 U.S. at 700; *see also supra* Sections I.B.–C. (discussing the ESA's objectives and broad remedial purpose).

This Court and lower courts have found that similar provisions in other statutes fail to articulate judicially manageable standards. *See, e.g.*, *Webster*, 486 U.S. at 594, 600 (holding that section 102(c) of the National Security Act of 1947, which provides that the director of Central Intelligence can terminate employees "whenever he shall deem such termination necessary or advisable in the interests of the United States," "foreclose[d] the application of any meaningful judicial standard of review"); *Baltimore Gas & Elec. Co. v. Fed. Energy Reg. Comm'n*, 252 F.3d 456, 461 (D.C. Cir. 2001) (holding that section 717 of the Natural Gas Act, providing that the Federal Energy Regulatory Commission "may in its discretion bring an action" against a violator, provided no

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particular methodology for considering economic impact."); Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 Buff. L. Rev. 1095, 1111 (2010) ("Congress did not mandate an actual cost-benefit analysis for designating critical habitat—rather, it allowed the agencies to 'take into account' economic impacts, which is quite different, and does not lend itself to striking down designations for inadequate consideration of economic impacts." (footnotes omitted)).

judicially manageable standards to review the agency's decision to settle an enforcement agreement); *Sierra Club v. Larson*, 882 F.2d 128, 129, 132 (4th Cir. 1989) (holding that section 131 of the Highway Beautification Act, requiring that states exercise "effective control" over outdoor advertising, provided "no law to apply" to the Federal Highway Administration's decision not to institute enforcement proceedings).

The only circuit courts to address this issue have held that the decision not to exclude an area from critical habitat designation is unreviewable. *See* Pet. App. 34a–35a; *Bear Valley Mut. Water Co.*, 790 F.3d at 990. District courts have reached the same conclusion. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) (holding the Secretary's "ultimate decision not to exclude [an area] from designation" was committed to agency discretion); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (finding the Secretary's decision not to exclude is unreviewable under the APA because "the plain reading of the statute fails to provide a standard by which to judge the . . . decision"); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629 WBS-GGH, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [Secretary's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion."),

opinion modified on other grounds on reconsideration, No. CIV. S-05-0629 WBS-GGH, 2007 WL 201248 (E.D. Cal. Jan. 24, 2007). *But see Wyo. State Snowmobile Ass'n. v. U.S. Fish & Wildlife Serv.*, 741 F. Supp. 2d 1245, 1248 (D. Wyo. 2010).

B. *Bennett v. Spear* is inapposite.

In *Bennett v. Spear*, the question was whether the petitioners could seek judicial review under the ESA's citizen-suit provision. 520 U.S. 154, 157 (1997). The *Bennett* petitioners claimed that the Secretary made an implicit critical habitat designation for an endangered fish by issuing a Biological Opinion under section 7(b) of the ESA without first considering the purported designation's economic impact under section 4(b)(2). *Id.* at 160. The government contended that the petitioners could not pursue this claim under the citizen-suit provision, which authorizes citizen suits when the Secretary fails to perform "any act or duty" under the ESA "which is not discretionary." *Id.* at 171–72 (citing 16 U.S.C. § 1540(g)(1)(C)). The Supreme Court held that the petitioners could seek judicial review under the citizen-suit provision because section 4(b)(2) requires the Secretary to consider the economic impacts before designating critical habitat. *Id.* at 172. The Court thus allowed the petitioners to proceed on their claim that the Secretary failed to satisfy a procedural requirement. *Id.* at 178.

In *Bennett*, the Secretary did not make an exclusion decision under section 4(b)(2), and the parties never briefed—nor did the Court address—whether a decision not to exclude an area from designation is separately reviewable. Thus, Petitioner's reliance on the *obiter dictum* that the "Secretary's ultimate decision [to designate critical habitat] is reviewable only for abuse of discretion," *id.* at 172, is inapposite. *See Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

Further, unlike in this case, the *Bennett* petitioners alleged that the Secretary did not adhere to section 4(b)(2)'s procedural requirements when he failed to consider the economic impacts of a purported implicit critical habitat designation. *Bennett*, 520 U.S. at 160, 172. The *Bennett* Court stated that "[i]t is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Id.* at 172. Here, there is no question that the Secretary followed the required procedural step of considering economic impact when he designated critical habitat for the dusky gopher frog under the first sentence of section 4(b)(2). Rather, Petitioner argues that the Secretary's failure to exclude Unit 1 from the ultimate critical habitat designation was incorrect. However, as set forth above, *see supra* Section III.A., the Secretary's

decision not to exclude an area from designation is unreviewable.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

U.S. FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR EVANGELICAL ENVIRONMENTAL NETWORK, *ET AL.* AS AMICI CURIAE SUPPORTING RESPONDENTS

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BRIEF FOR EVANGELICAL ENVIRONMENTAL NETWORK, *ET AL.* AS AMICI CURIAE SUPPORTING RESPONDENTS

Amici are a group of religious organizations, and respectfully submit this brief in support of respondents Center for Biological Diversity, Gulf Restoration Network, and the U.S. Fish and Wildlife Service, *et al.*

INTEREST OF AMICI CURIAE[1]

Amici are a diverse set of five faith-based groups, pursuing their respective faiths alongside each other and recognizing a shared commitment, rooted in religious teachings and principles, to care for the earth and its species. Amici have a wide array of beliefs and come from different faith traditions, yet they unite here to speak with one voice in urging the Court to uphold the Fifth Circuit's interpretation of the Endangered Species Act.

Amici's diverse religious traditions emphasize the religious obligation of stewardship for the earth and all its creatures. Stewardship requires us to protect species against extinction and restore endangered species. Above all, stewardship calls us to ensure that what was passed on to us will be passed on to future generations. Extinction is a distinctly devastating harm to

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

the environment because it cannot be undone. It is also a dereliction of the duty of stewardship. Amici submit this brief to underscore the moral and practical importance of preventing species extinction and restoring endangered species. Congress well appreciated the magnitude of the harm when it drafted the Endangered Species Act. Petitioner would weaken the Act and diminish our legal obligation to ward against such tragedy. Its claim should be rejected.

Amici are as follows:

Evangelical Environmental Network (EEN), a 501(c)3 nonprofit organization founded in 1993, is a ministry that educates, inspires, and mobilizes Christians in their effort to care for God's creation, to be faithful stewards of God's provision, to get involved in regions of the United States and the world impacted by pollution, and to advocate for actions and policies that honor God and protect the environment. The EEN publishes materials to equip and inspire individuals, families, and churches; and seeks to educate and mobilize Christians to make a difference in their churches and communities, and to speak out on national and international policies that affect our ability to preach the Gospel, protect life, and care for God's creation.

National Council of Churches USA (NCC), a 501(c)3 nonprofit organization, is the principal ecumenical organization in the United States with 35 Protestant, Orthodox, and Anglican member denominations with a combined membership of more than 45 million Christians in nearly 100,000 congregations

from Protestant, Anglican, Orthodox, Evangelical, historic African American and Living Peace traditions nationwide. The NCC has considered the moral implications presented by environmental issues through the lens of long-standing social teaching and have adopted numerous policy statements calling for a response to these threats to God's creation. Since 1950, the NCC has served as a leading voice of witness to the living Christ.

Coalition on the Environment and Jewish Life (COEJL) is an initiative of the Jewish Council for Public Affairs, a 501(c)3 nonprofit organization. The Jewish Council for Public Affairs is the public affairs arm of the organized Jewish community and serves as the advisory body for the 16 national and 125 local Jewish community relations organizations. The COEJL deepens and broadens the Jewish community's commitment to stewardship and protection of the Earth through outreach, activism and Jewish learning. Today, COEJL's priorities are to mobilize the Jewish community to address the environmental issues through advocacy for appropriate legislation as well as action. COEJL challenges and supports Jewish organizations to pursue sustainability in their facilities, operations and programs in order to protect the earth for future generations.

Franciscan Action Network (FAN), a 501(c)3 nonprofit organization, was founded in 2007 as a collective Franciscan voice seeking to transform United States public policy related to peace making, care for

creation, poverty, and human rights. The FAN sees the interconnectedness of all creation and the common origin of humanity as rooted in God's loving design for the earth and all people. Recognizing this fundamental goodness of God through the act of creation, FAN counters the social sinfulness that persistently compromises God's hopes, through a clarion call to conversion. It is through continual conversion that the cry of the earth and the cry of the poor can be heard in their authenticity and understood in a way that leads us to rediscover our original goodness, both personally and collectively.

Reconstructionist Rabbinical Association, a 501(c)3 organization, serves as the collective voice of Reconstructionist rabbis, the rabbinic voice of the Reconstructionist Movement and as a Jewish voice in world affairs. Based upon our deep engagement with Jewish traditions, texts and teaching and in concert with our highest held values and aspirations, it is incumbent upon us to be present in the world's market place of ideas and viewpoints. The Reconstructionist Rabbinical Association is keenly aware of the environmental crisis we face, and acknowledges the supreme Jewish value to guard and protect the environment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks: How hard must we try to prevent species extinction? Amici, who represent a variety of faiths, urge that both our faith traditions and the law require us to try quite hard. Amici believe we are called by God to fulfill a duty of stewardship to care for the earth. The extinction of a species, the permanent and irreversible loss of one of God's creatures, breaches that duty of stewardship. The dusky gopher frog, which once lived across wide swaths of America's south, is now at serious risk of extinction. The future of that species, and others, is at stake in this case.

The Endangered Species Act of 1973 reflects amici's deeply rooted conviction that the loss of a species is a grave harm. This Court has noted that Congress viewed species loss as demanding special attention in *Tennessee Valley Authority v. Hill*, noting, "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." 437 U.S. 153, 184 (1978).

In view of the stakes, both moral and practical, we are obligated by both faith and the Endangered Species Act to conserve the habitat of endangered species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3). The designation of critical habitat is among the most important conservation tools within the Endangered Species Act. The law grants

substantial authority to the Fish and Wildlife Service in designating critical habitat because of the gravity of the harm it seeks to avoid. The Fish and Wildlife Service is well within its statutory authority in its efforts to preserve and restore the dusky gopher frog, but those efforts are threatened by avarice.

Amici's faiths teach that the duty of stewardship requires responsible administration of the bounty of the earth because all living things are God's creation and have inherent value. We are called to preserve the earth for future generations. Our duty includes both caring for the earth as we find it and actively repairing damage we, or others, have done to the natural world. The conservation of critical habitat, central to amici's duty of stewardship, is likewise at the heart of the Endangered Species Act. *See* 16 U.S.C. § 1532(5).

Preserving and restoring species is quite challenging. It requires us to think in the long term and to conserve not just individual species, but also the critical habitats which they need to survive. *See* 16 U.S.C. § 1533(5) (defining "critical habitat"). Petitioner focuses on the short term. Its crabbed interpretation of the Endangered Species Act's critical habitat provisions would distort the plain text of the statute and would undermine its purpose. Given time, nature can heal. Keeping in view both the needs of the present and the demands of the future, our faiths teach us not to shirk our sacred duty, though fulfilling that duty may demand much of us.

Amici strive to create a common good, allowing us to build a beloved community in which we each stand in right relationship with God, our fellow persons, and the natural world. While economic vitality is a component of communities, it should not be mistaken for the full measure of the good. Petitioner would treat economics as the key metric and reduce other important values to ancillary concerns. The Endangered Species Act reflects the proper understanding that economic considerations be taken into account and balanced alongside other relevant but not directly comparable interests. *See* 16 U.S.C. § 1533(4)(b)(2).

Responsible long-term management of the earth and its resources is not only a central tenet of amici's religious traditions, it is also the animating principle of the Endangered Species Act. In recognition of both the teachings of our faiths and the legal requirements of the Act, amici respectfully urge this Court to uphold the Fifth Circuit's decision.

ARGUMENT

As faith groups, amici believe we have a duty of stewardship over the earth and all God's creatures, including the dusky gopher frog. The duty of stewardship requires us to protect vulnerable species from extinction. We are called to do so because all species have inherent value as a part of God's creation and because we have a responsibility to manage that creation responsibly for the good of future generations. Where the

earth has been harmed because of our mismanagement, stewardship imposes on us a further duty to repair that harm. The Endangered Species Act (ESA) mirrors the ethic of stewardship, demanding that we not only take strong measures to prevent species extinction because it is a grave and irremediable harm, but also that we work proactively to conserve species and ensure their survival.

Further, amici's faiths teach us that the pursuit of the common good mandates that we not use "with impunity the different categories of being, whether living or inanimate." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* no. 466 (2005). Rather, we must engage with the earth responsibly, ever mindful of advancing the common good. The ESA similarly recognizes that, when designating critical habitat, the Secretary of the Interior must find some balance among various, incommensurable goods, including economics. But even where the statute allows consideration of economic factors, it emphasizes that economic impacts are neither the sole nor the chief consideration. Our reason and our faiths teach us that preventing species extinction is of great value in the political and economic as well as the moral and spiritual realms.

Amici respectfully urge this Court to affirm the judgment below and permit the ESA to continue to vindicate our legal and moral duties to care for the earth and its creatures.

I. The Endangered Species Act reflects the religious obligation of stewardship incumbent on all persons of faith.

Amici's religious traditions teach that the natural world has intrinsic worth, because it is God's creation. For Jews and Christians, stewardship is rooted in the creation story of Genesis: "The Lord God took the man and put him in the Garden of Eden to work it and take care of it." *Genesis* 2:15. God delights in creation as the ultimate expression of God's creative will. *See id.* 1:31 ("God saw all that He had made, and it was very good."); *see also Psalms* 19:1 ("The heavens declare the glory of God, and the sky above proclaims his handiwork.").

In recognition of the value of creation, God entrusted stewardship over the natural world to human beings. Stewardship calls us to manage the earth responsibly, advancing the interests of humankind while respecting the inherent value of creation. The religious duty of stewardship is the moral undergirding of the ESA's mandate to protect vulnerable species from extinction.

Even as we are charged as stewards of God's creation, Deuteronomy reminds us that the world belongs to God, and not to people: "To the Lord your God belong the heavens, even the highest heavens, the earth and everything in it." *Deuteronomy* 10:14. While human beings should enjoy the bounty of the earth and satisfy our needs, we must do so in a way compatible with our duty of stewardship, respecting the intrinsic value of

creation. In this way, the good steward fulfills God's will that "man should communicate with nature as an intelligent and noble 'master' and 'guardian,' and not as a heedless 'exploiter' and 'destroyer.'" Pope John Paul II, *Redemptor Hominis* 15 (1979); *see also* Pope Benedict XVI, *Caritas in Veritate* no. 50 (2009).

Three premises animate the duty of stewardship across religious traditions: (1) stewardship recognizes that the earth has inherent value and is itself an expression of God's creative will; (2) stewardship requires that we care for the earth for the good of future generations; and (3) stewardship calls us to not only prevent future harm to the earth and its creatures, but also to repair what damage has already been done. These same commitments characterize the good administrator envisioned in the ESA. The duties of stewardship thus closely align with the Fish and Wildlife Service's duties under the ESA, supporting the judgment of the court below.

A. Stewardship requires that the earth be managed responsibly because all species have inherent value as part of God's creation.

Amici's religious traditions teach us that good stewardship requires us to manage the earth responsibly because creation is valuable in and of itself as an expression of God's creative will. Thomas Aquinas observes in his *Summa Theologiae* that the very diversity of life manifests God's glory. Because the divine

goodness could not be represented by one creature alone, Aquinas tells us that God "produced many and diverse creatures, so that what was wanting to one in representation of the divine goodness might be supplied by another . . . hence the whole universe together participates in the divine goodness more perfectly, and represents it better than any single creature whatever." Thomas Aquinas, *Summa Theologiae*, I.47.1.

The diversity of creation reflects God's glory, and a steward has no right to diminish this glory through callous mismanagement: "Because of us, thousands of species will no longer give glory to God by their very existence, nor convey their message to us. We have no such right." Pope Francis, *Laudato Si'* 33 (2015). Not only does all life have inherent value, but we also know the practical importance of biodiversity. Stewardship requires us to protect the earth in recognition of the value of the natural world in and of itself.

The Talmud likewise acknowledges the irreducible value of every species, observing that, "Everything that the Holy One, Blessed be He, created in His world, He did not create anything for naught." Babylonian Talmud, *Shabbat*, 77b. In his authoritative *Guide to the Perplexed*, Jewish philosopher Maimonides observes that, "It should not be believed that all the beings exist for the sake of the existence of humanity. On the contrary, all the other beings too have been intended for their own sakes, and not for the sake of something else." Maimonides, *Guide to the Perplexed*, III:13. That all God's creatures have an irreducible value is expressed in the Talmud, which teaches us

that "*Adam* (the human) was created on the eve of the Sabbath (i.e., last). And why (what can we learn from the order of Creation)? So that if he becomes too haughty, he can be told: the gnat preceded you in the order of Creation." Babylonian Talmud, *Sanhedrin* 38a.

Because all creatures have irreducible value, the duty of stewardship charges us with protecting them all. This sacred duty is enshrined in the covenant God made not only with Noah, but with all the creatures of the earth, following the Flood: "I now establish my covenant with you and with your descendants after you and with every living creature that was with you – the birds, the livestock and all the wild animals, all those that came out of the ark with you – every living creature on earth." *Genesis* 9:9–11. God's covenant with all living beings – not just human beings – obligates us to care for all species.

The ESA envisions an administrator who fulfills the duty of stewardship by recognizing the inherent value of all species. The text of the ESA clearly announces the Act's purpose: "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). In carrying out this broad purpose, the ESA endows the administrators at the Fish and Wildlife Service with a broad mandate, providing for the "use of all methods and procedures which are necessary to bring any endangered species

or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

Beyond the plain text of the statute, the intent of the ESA as a legislative bulwark against the extinction of species has long been recognized by this Court. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). Indeed, where critical habitat is necessary to prevent the extinction of a species, critical habitat designation is mandatory:

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, *unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

The statute explicitly delegates broad discretion to the Secretary of the Interior to designate critical habitat. *See* 16 U.S.C. §§ 1533, 1540(f). This Court has recognized and affirmed the Secretary's authority to so designate free of the interference of the courts: "When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his." *Babbit v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 708 (1995). Amici respectfully submit that in this case, the

United States Court of Appeals for the Fifth Circuit recognized that the Fish and Wildlife Service acted not only well within its statutory authority, but also in so acting, fulfilled its responsibilities to act as a responsible administrator in compliance with the duty of stewardship.

B. Stewardship requires people of faith to manage the earth responsibly as the patrimony of future generations.

Stewardship calls us to be mindful of both the needs of today and the needs of future generations. As Jesus teaches in the Gospel of Luke, God will call those entrusted with stewardship to account for how we managed creation. *See Luke* 16:2 ("There was a rich man whose manager was accused of wasting his possessions. So he called him in and asked him, 'What is this I hear about you? Give an account of your management, because you cannot be manager any longer.'"). Careful and just management is essential to ensure the patrimony of creation is passed to future generations. *See* Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* 466 (2005) ("Responsibility for the environment, the common heritage of mankind, extends not only to present needs but also to those of the future."); *see also* United States Catholic Conference, *Renewing the Earth: An Invitation to Reflection and Action on Environment in Light of Catholic Social Teaching* (Nov. 14, 1991) ("At the heart of the Christian life lies the love of neighbor. The ecological crisis, as Pope John Paul II has urged,

challenges us to extend our love to future generations and to the flourishing of all earth's creatures.").

Our faith traditions teach us that the resources of the earth are not unlimited. For example, just as God ordains a day of rest every seven days for human beings through *Shabbat*, so too God ordains a year of rest every seventh year for the land through *Shemita*. *See Exodus* 23:10–11 ("For six years you are to sow your fields and harvest the crops, but during the seventh year let the land lie unplowed and unused."). Prudence dictates that we must sometimes moderate immediate gain to ensure the long-term health of our planet. The ESA reflects the recognition that the resources of the natural world are limited, and that the bounty that had sustained thousands of generations could be catastrophically depleted by just a few technologically advanced generations.

The most serious result of mismanagement is extinction, the complete and permanent loss of a species. The administrator who permits the loss of the dusky gopher frog, or any other animal God has created for us, has failed to fulfill his or her duty of stewardship. God has entrusted us to care for the earth for the benefit of future generations. Species loss is a violation of our duty as God's trustee for the benefit of those who will come after us.

The ESA was intended to prevent us from breaching our duty to leave the world no worse than we found it. The legislative history of the ESA reflects this commitment. The Chair of the U.S. House Committee on

Merchant Marine and Fisheries analogized our responsibility to care for the earth to that of custodians of a building in which was gathered one copy of every book ever written:

> [O]ur choice is between exercising our responsibilities and ignoring them. If these theoretical custodians were to allow a madman to enter, build a bonfire, and throw in at random any volume he selected, one might with justification suggest that other [custodians] be found, or at least that they be censored and told to be more careful in the future. So it is with mankind. Like it or not, we are our brothers' keepers, and we are also keepers of the rest of the house.

H.R. Rep. No. 93–412, at 3–4 (1973).

Both responsible stewardship and responsible administration require us to work to prevent species' extinction not only for the good of the present, but also for the good of future generations.

C. Stewardship requires us to repair the earth where it has been harmed by human activity.

Stewardship requires not only responsibly managing existing resources, but also actively participating in the repair and restoration of a natural order harmed by human activity. This responsibility is clearly expressed in the Jewish principle of *tikkun 'olam*, whereby the humans undertaking the duty of stewardship over

God's creation are called upon to continuously strive to repair that which is damaged in the world. The duty to repair is lyrically expressed in a classic rabbinic midrash on *Genesis* 1:26: "When God created Adam he led him past all the trees in the Garden of Eden and told him 'See how beautiful and excellent are all my works. Beware lest you spoil and ruin My world. For if you spoil it, there is nobody to repair it after you.'" *Kohelet Rabbah* 7:13.

The duty to protect – and, where necessary, to repair – thus falls squarely on the shoulders of human beings. As Archbishop of Canterbury Rowan Williams observed, "in a world where exploitative and aggressive behavior is commonplace, one of the 'providential' tasks of human beings must be to limit damage and to secure space for the natural order to exist unharmed." Rowan Williams, *Renewing the Face of the Earth: Human Responsibility and the Environment*, Ebor Lecture, York Minster (March 25, 2009).

The act of creation is ongoing, as reflected in God's pronouncement that at the end of the six days of Creation the world was "very good," which is qualitatively different than "holy" or "perfect." *See Genesis* 1:31. The holy and the perfect remain as ideals towards which the natural world and all its creatures strive. The Christian, under his or her duty of stewardship, likewise recognizes that God's will redeems both people and nature in the new heaven and earth. Knowing this, Christians are called to be active participants in redeeming nature here and now as an expression of their

own redemption and the "living out" of their faith. *See Philippians* 2:12–13; *James* 2:14–25.

The ethic of restoration runs throughout the ESA, and is most plainly expressed in the Act's provisions for the designation of land not presently occupied by the species in question as critical habitat. The Act is committed to ensuring the survival and promoting the recovery of threatened species. Species recovery is at the heart of the ESA, and the conservation of critical habitat is a key mechanism of species recovery.

Conservation may require the preservation of habitat in which the species currently lives ("occupied" critical habitat), as well as preservation of habitat in which the species does not currently live ("unoccupied" critical habitat). *See* 16 U.S.C. § 1532(5)(A)(ii). The ESA does not draw an evaluative distinction between occupied and unoccupied critical habitat: the statute requires the protection of one or both types of habitat where necessary to meet the statute's conservation mandate. The Act requires us to take a long-term view. Species recovery requires a sustained and strong commitment.

Courts have recognized Congress' intent that the ESA have two distinct, though complementary goals: conservation and survival. The purpose of establishing "critical habitat" is to protect territory necessary not only for the species' survival, but also for its recovery. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (referencing 16 U.S.C. § 1533(f)(1): "The Secretary shall develop

and implement plans . . . for the conservation and survival of endangered species and threatened species."). Petitioner's narrow reading of "critical habitat" as limited to land where the species could presently thrive is not only patently inconsistent with the text and the purpose of the ESA, but also contradicts the Circuit court's well-established interpretation of the Act.

II. The Endangered Species Act reflects the religious conviction that pursuit of the common good, covenantal community, and right relationships prevents us from using God's creation simply as one wishes for one's own economic gain.

Economic interests do not define the common good or right relationships. Rather, we are called to seek the general welfare for all. Catholic thought develops this idea as the common good. Many Protestants understand this same idea as the seeking of right relationships – with each other, with God and with God's creation. In Jewish thought, it is understood in the centrality of the covenantal community.

These teachings require us to prioritize community, relationship, and the realization that we do not exist for ourselves alone. We recognize that the good of the community is not found solely in economic considerations. It is the aggregate of the good of individual persons living not as individuals, but in an interdependent web of community. Though it may be tempting

to reduce the complex problem of endangered species to a single dimension, like wealth maximization, doing so prevents us from striving for the common good and right relationships that are at the heart of a healthy and vibrant community.

Petitioner would unsettle the law by giving special weight to just one dimension of the costs and benefits of critical habitat designation: namely, profit maximization. Cloaking a significant change in the language of administrative procedure, the claim that judicial review should be expanded to give special weight to one kind of economic impact is both contrary to law and flies in the face of widely shared American norms.

The ESA mirrors our faith-based commitments to the common good, right relationships and the covenantal community. The Secretary of the Interior is vested, by Congress, with the responsibility and authority, when designating critical habitat, to chart a course among complex webs of social goods. The Secretary is well-positioned to study the situation over time, balance the needs of the present against our duties to the future, and make the judgments required to find a right mix of social goods to meet our moral and legal obligations. A rule can tell us what to do when a single fundamental value is violated, but a rule is less useful when we are called to balance incommensurable goods.

Importantly, precedent also commits this decision to the Secretary and should control this case. *See Sweet Home*, 515 U.S. at 708 (noting that in the ESA, Congress has granted the Secretary broad administrative

and interpretive discretion). We thus respectfully urge this Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

A. Religious teachings instruct us that human flourishing requires considering and weighing competing goods.

Amici's faiths teach us that economic interests alone do not define or exhaust the common good or right relationships. Pursuit of the common good requires us to think about and weigh practical, spiritual, moral, aesthetic and other concerns. Balancing these concerns is a challenge because the interests are often incommensurate with one another. Lacking a common axis along which these goods can be compared, discerning the proper place of each consideration in a given context is a human judgment and a moral act. It does not answer to the application of a rule or a process that can be stated with precision. Teachings on the common good, right relationships and the covenantal community remind us that no particular good – whether economic, social, or political – is coterminous with the common good. No single virtue or goal can dominate to the exclusion of others. Rather, disparate goods must be brought into harmony with one another.

In the Catholic tradition, the common good is defined as "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment." Pope Paul VI, *Gaudium et Spes* I.2.26 (1965).

Recalling the image of the Church as the Body of Christ, just as injury to one part of the body injures the whole body, so too injury to one person in the society or one constituent element of the whole injures the whole society. *See 1 Corinthians* 12:12–26.

Thus, the common good is neither simply the aggregate of the private goods of the individuals in the society, nor is it merely the good proper to the whole, but rather is "common *to the whole and to the parts*." Jacques Maritain, *The Rights of Man and Natural Law* 7 (1944). Our faiths teach us to seek the common good. For a political community, the common good is embodied in the law. Thomas Aquinas, *Summa Theologiae*, I.90.4 ("[Law] is . . . an ordinance of reason for the common good, made by him who has care of the community and promulgated [by him]."). In making and interpreting law, legislators and jurists are thus instrumental in bringing the common good into being for the political community.

The Protestant tenet of right relationships likewise recognizes that justice lies at the core of vibrant communities. It requires "creating right relationships, both social and ecological, to ensure for all members of the Earth community the conditions required for their flourishing." Nat'l Council of Churches, *God's Earth is Sacred: An Open Letter to Church and Society in the United States* (Feb. 14, 2005).

The principle of right relationships charges us to engage in the difficult work of standing in honest and just relations with God, our fellow human beings, and

creation. It recognizes the challenge of creating these relationships amid competing concerns. As acclaimed American theologian Reinhold Niebuhr wrote, value is inescapably relational: "[V]alue is the good-for-ness of being for being in their reciprocity, their animosity, and their mutual aid . . . everything has value, positive or negative, in its relations." Reinhold Niebuhr, *Radical Monotheism and Western Culture – With Supplementary Essays* 107 (1943).

Thus, at its heart, maintaining right relationships is an acknowledgement of our deep interconnectedness with both the divine and the natural world. In the words of the Archbishop of Canterbury, Rowan Williams:

> Renewing the face of the earth, then, is an enterprise not of imposing some private human vision on a passive nature but of living in such a way as to bring more clearly to light the interconnectedness of all things and their dependence on what we cannot fully master or understand.

Rowan Williams, *Renewing the Face of the Earth: Human Responsibility and the Environment*, Ebor Lecture, York Minster (March 25, 2009).

The idea of right relationships likewise resonates with the Jewish idea of the covenantal community. God's covenant with the Jewish people is not based on individual commitments, but rather with the Jewish community as a whole. *See Talmud, Rosh Hashanah* 17b–18a. A person's relationship with God exists within

his or her relationship with the community, such that each person must attend to both his or her personal welfare and the welfare of the community as a whole. The Talmudic sage Hillel expresses this balancing in his famous question: "If I am not for myself, who is for me? And when I am for myself, what am I?" Pirkei Avot 1:14.

Indeed, Maimonides teaches us that the pursuit of the good life requires us to balance sometimes conflicting impulses. *See* Maimonides, *De'Ot* 4 ("If a man will always carefully discriminate as regards his actions, directing them to the medium course, he will reach the highest degree of perfection possible to a human being, thereby approaching God, and sharing in His happiness."). Though striking the right balance is no easy feat, the Jewish tradition teaches us that only by so doing can we reach our full potential both as individuals and as a community.

Though the Catholic, Protestant, and Jewish traditions elaborate the idea differently, each tradition recognizes that we are called to seek a kind of human flourishing that is not reducible to a single good. We are taught to make a conscious effort to seek the good life. We know that privileging one good to the exclusion of others does real violence to human flourishing and impedes the faithful person's efforts to stand in right relation with God.

B. The text and purpose of the ESA require that economic considerations be considered alongside and balanced with other goods in designating critical habitat.

Just as our faiths teach us that pursuing the good life requires choosing among and balancing competing goods, so too does the ESA. And just as our traditions warn us that financial success is not the only good, so too does the ESA. The Act recognizes that the irresponsible pursuit of economic growth has been a driving force of species' extinction: "various species of fish, wildlife, and plants in the United States have been rendered extinct as a *consequence* of economic growth and development." 16 U.S.C. § 1531(a)(1) (emphasis added). At the same time, the Act recognizes that economic considerations are relevant and should be considered by the Secretary. As such, even where the statute calls attention to economic considerations, it recognizes their complexity.

The drafters of the ESA recognized that species extinction not only has an economic dimension, but also raises important ethical, aesthetic, educational, scientific and economic considerations. *See* 122 Cong. Rec. 3259 (1976), *reprinted in* Comm. on Env't & Pub. Works, 97th Cong., *A Legislative History of the Endangered Species Act of 1973*, as Amended in 1976, 1977, 1978, 1979, and 1980, at 554. Indeed, the Act begins with the finding that endangered and threatened species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3).

Consistent with the Act as a whole, the statutory authority to designate critical habitat reflects these same concerns and carefully directs attention to particular goods in particular sections. The statute requires that the designation of critical habitat focus first on the facts. It states: "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(4)(b)(2). The statute, having found in its opening section that economic factors are a driver of species loss, recognizes that economic impact be considered, but requires that it be weighed against other interests also discussed in earlier provisions.

Petitioner's contentions about the reviewability of economic determinations seek a significant departure from settled law, but amici leave that argument to the merits brief. Here, we note that once the door is opened to a special focus on economics, through that door strides the claim that designating Unit 1 as a critical habitat was inappropriate because it provides "no benefits" for the frog but instead imposes substantial financial burdens on Petitioner.

This argument misreads the record on costs and ignores the significance of habitat preservation in the work of species recovery. More fundamentally, the Petitioner's rhetoric ignores the significant benefits we all gain from the habitat designation in this case.

Amici, and all people, gain by fulfilling our moral and legal duties. We gain by accepting limits as individuals to keep faith with our communities, with future generations, and with God.

The Fish and Wildlife Service's evaluation of the evidence supporting designation of Unit 1 as critical habitat was thorough. The agency's report, using the expertise of the responsible administrator, followed the statute in weighing different kinds of goods alongside one another. Weighing economic considerations is particularly challenging in the context of endangered species for, as Cass Sunstein notes, evaluating endangered species according to a strict cost/benefit analysis is not appropriate because the concern is about "genuinely irretrievable loss." Cass Sunstein, *The Cost Benefit State* 68 (2002). One cannot compare hypothetical economic loss on the one hand with the almost inevitable loss of life on the other if Unit 1 is not designated as a critical habitat. Petitioner would put a heavy thumb on the scale, overriding non-economic concerns. Allowing economic interests to override all other interests is at odds with the fundamental purpose of the statute: to prevent species' extinction. The ruling below was both right and lawful; it should be affirmed.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit decision should be affirmed.

Respectfully submitted,

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No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE FORMER DEPARTMENT OF THE INTERIOR OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are former leaders of the Department of the Interior ("DOI"), ranging from the Nixon administration through the Obama administration, who administered and enforced the Endangered Species Act ("ESA"), including reviewing, overseeing, and approving critical habitat designations. Amici file this brief to demonstrate that the critical habitat designation made here was consistent with critical habitat designations made throughout the years, and to provide the perspective of the agency officials who are responsible for these determinations.

Each of the amici served in leadership positions at DOI since the passage of the ESA.

Beginning in 1974, Donald Barry spent over eleven years as an attorney in the Solicitor's Office of DOI, including six years as chief counsel for the U.S. Fish and Wildlife Service ("FWS" or "Service"). As an attorney for the Service, Mr. Barry was charged with legal review of nearly all critical habitat designation decisions. He later returned to DOI during the Clinton administration, where he spent seven-and-a-half years in the office of the Assistant Secretary for Fish and Wildlife and Parks, serving for three-and-a-half years

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution intended to fund the preparation or submission of this brief. The parties have all filed blanket consents to amicus briefs. Pursuant to Rule 37.3(a) of Rules of this Court, letters of consent from all parties to the filing of the brief are on file or have been submitted to the Clerk of the Court.

as the Assistant Secretary for Fish and Wildlife and Parks. In that position, Mr. Barry reviewed and provided final approval for critical habitat designations after they came from the Director of FWS and the Solicitor's Office. In total, Mr. Barry spent 19 years working at DOI as a career attorney or in a leadership position in the office of the Assistant Secretary.

Michael J. Bean worked at DOI from 2009 to 2016 during the Obama administration. During his tenure at DOI, he served initially as counselor to the Assistant Secretary for Fish and Wildlife and Parks, and ultimately as the Principal Deputy Assistant Secretary. Mr. Bean is the co-author of *The Evolution of National Wildlife Law*, which is generally regarded as the leading text on the subject of wildlife conservation law.

George Frampton served as Assistant Secretary for DOI for four years, from 1993 to 1997, during the Clinton administration. As Assistant Secretary for DOI, Mr. Frampton reviewed and approved all listings and critical habitat designations. In addition to his time at DOI, Mr. Frampton served as the Chairman of the White House Council on Environmental Quality, where he served as President Clinton's principal advisor on environmental issues. In this role, Mr. Frampton regularly dealt with endangered species, including listings and critical habitat designations, as the Secretary for DOI would often consult with the Council on Environmental Quality in difficult or close cases.

Nathaniel Reed became the Assistant Secretary for DOI for Fish and Wildlife and Parks in 1971 during

the Nixon administration and remained in that position through the Ford administration. During his tenure as Assistant Secretary for DOI, Mr. Reed lobbied on behalf of and testified in favor of the passage of the ESA.

SUMMARY OF ARGUMENT

Weyerhaeuser ("Petitioner"), the Markle Interests LLC,[2] and their amici incorrectly portray how and why critical habitat designations are made. This brief gives voice to former leaders at DOI, who made these science-based determinations through a highly regulated and careful process.

First, the brief presents the perspective of the former DOI leaders regarding the role of critical habitat designations in species conservation and the process necessary to reach determinations based on science. These designations play a vital role in species recovery and are necessarily crafted by conservation experts using a methodical process rooted in complex scientific analysis. The designation of critical habitat for a listed species that is degraded and would benefit from restoration can nevertheless be essential for the species' conservation.

[2] The Markle Interests LLC include Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC.

Amici's experience also shows that allowing judicial review for decisions not to exclude would result in increased litigation and additional economic analyses and would be administratively infeasible. The result would thus divert necessary resources from the ESA's main objective of recovery of endangered wildlife.

ARGUMENT

I. To Further the Objectives of the Endangered Species Act, Designation of Critical Habitat Must Be Based on Methodical Scientific Analysis by Species Conservation Experts.

A. The evolution of critical habitat designations in the ESA.

When Congress enacted the ESA in 1973, it introduced two new features that had not been a part of predecessor legislation in 1966 and 1969. *Compare* Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 886 (1973), *with* Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, 926 (1966), *and* Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, 275 (1969). One was the concept of critical habitat, which recognized that the degradation and loss of habitat was the most significant threat to the survival of endangered and threatened species.

The other was the notion that federal agencies bore a special responsibility to refrain from actions

that would further imperil already highly imperiled species. This special responsibility of federal agencies was embodied in Section 7 of the ESA, which requires that federal agencies insure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or destroy or adversely modify its critical habitat. Endangered Species Act of 1973, Pub. L. No. 93-205 § 7, 87 Stat. 884, 886 (1973) (codified as amended at 16 U.S.C. §§ 1536 to 1544 (2012)). This special duty of federal agencies is the only operative result of a critical habitat designation. Critical habitat designation does not directly affect what private and other non-federal landowners may do with their property, except insofar as they require a federal permit or received federal funding in connection therewith.

The ESA, as enacted in 1973, neither defined the term critical habitat nor required its designation for each listed species. *See id.* That soon changed, however, as a result of a series of amendments from 1978 to 1982. Those amendments both defined the term to include occupied and unoccupied areas and required that each new listing of a species as endangered or threatened be accompanied at the time of listing by a critical habitat designation, subject only to a very narrow set of exceptions. *See* Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, 3764 (1978) (codified as amended at §§ 1532 to 1536, 1538 to 1540, 1542 (2012)); Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (1982) (codified as amended at 16 U.S.C. §§ 1531 to 1533, 1535

to 1537a, 1538 to 1540, 1542 (2012)). These specific amendments are now codified in the ESA. *See* 16 U.S.C. § 1532(5); 16 U.S.C. § 1533(a)(3); 16 U.S.C. § 1533(c). Thus, critical habitat plays a vital, but limited role in achieving the ESA's purposes.

B. Critical habitat designations are necessary to achieve the objectives of the Endangered Species Act.

Conservation of listed species is the ESA's key objective. *See* 16 U.S.C. § 1531(b). Further, the ESA seeks to secure the recovery of endangered and threatened species, bringing them back from the brink of extinction so that they may be de-listed. *See also* 16 U.S.C. § 1532(3) (defining "conserve," "conserving," and "conservation," to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"). Assuring adequate habitat for the species to persist is a prerequisite to conserving a species. *See* Ronny Millen & Christopher L. Burdett, *Critical Habitat in the Balance: Science, Economics, and Other Relevant Factors*, 7 Minn. J.L. Sci. & Tech. 227, 268 (2005) ("[H]abitat conservation is the key component of effective species conservation."); Amy Armstrong, *Critical Habitat under the Endangered Species Act: Giving Meaning to the Requirements for Habitat Protection*, 10 S.C. Envtl. L.J. 53, 75 (2002) ("'The relationship between vanishing habitats and vanishing species is well documented. . . .'" (quoting

Nat'l Res. Council, Science and the Endangered Species Act (1995))).

Critical habitat designation is a key conservation tool for assuring adequate suitable habitat for species recovery. *See* 16 U.S.C. §§ 1532(5)(A), 1533(a)(3); Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Revising Critical Habitat under the Endangered Species Act*, 58 Buff. L. Rev. 1095, 1117 (2010) ("[T]he legislative history supports the importance of critical habitat . . . including compelling statements such as: 'the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitats.'" (quoting H.R. Rep. No. 94-887, at 3 (1976))); Armstrong, *supra*, at 54 ("When Congress enacted this amendment it 'observed that protection of the habitat of listed species was the key to protection of the species themselves' because the loss of habitat is the universally recognized reason for the extinction of species." (quoting S. Rep. No. 106-126, at 4 (1999))).

Members of Congress recognized the importance of habitat protection in saving endangered species from extinction. *See* 119 Cong. Rec. 30,528 (1973) (statement of Rep. Lehman) ("The new law recognizes that the greatest threat to endangered animals has been man's destruction of their habitat."); 119 Cong. Rec. 30,162 (1973) (statement of Rep. Sullivan) ("For the most part, the principal threat to animals stems from the destruction of their habitat.").

C. DOI takes a cautious, methodical, and reasoned approach to designating critical habitat.

Designating critical habitat requires a formal, multi-step process that incorporates scientific and economic analysis, public notice and comment, and, as of recently, outside peer review. *See* 50 C.F.R. § 424.12. Because of the scientific complexity of critical habitat designations and their significance in achieving recovery, DOI is mandated to make these designations based on the "best scientific data available." 16 U.S.C. § 1533(b)(2).

For several decades, the critical habitat designation process has started at the regional level, and then proceeded to a formal review process at the national agency and departmental level. For example, during the Clinton Administration, the formal review process for listing a species involved the review and sign-off by attorneys for FWS in the Solicitor's Office, and then the final review and decision by the Director of FWS. When a new listing also included a critical habitat designation, that decision was also reviewed and approved by the Assistant Secretary for Fish and Wildlife and Parks. This process also incorporates an opportunity for public comment following publication in the Federal Register, and can involve public hearings. Throughout the entire process, there is ample opportunity for input from affected state fish and wildlife agencies and the public, as well as consideration and analysis of expert opinion from scientists, economists, and other specialists. *See* 16 U.S.C. § 1533(b)(5).

Amici who were DOI political appointees relied on the professional judgment and decisions of the Directors of FWS they oversaw, as the Director is required by law to be trained and experienced in wildlife conservation. 16 U.S.C. § 742b(b) ("No individual may be appointed as the Director unless he is, by reason of scientific education and experience, knowledgeable in the principles of fisheries and wildlife management."). ESA decisions involve complex scientific issues, and it is only prudent to rely on professionals with a strong background in wildlife biology and conservation.

D. Critical habitat designations reflect the unique biological realities and conservation needs of each species.

Even before Congress supplied a definition of critical habitat through the 1978 Amendments, FWS relied upon its regulatory definition that made clear that species were not limited to currently occupied areas. Specifically, that regulatory definition included both occupied areas and additional areas needed for "population expansion." *See* Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act, issued by the Director of the U.S. Fish and Wildlife Service on April 22, 1976. That additional areas may be needed for population expansion of a depleted species had never been questioned.

It would follow from the Petitioner's position that federal agencies could authorize, fund, or carry out actions that would permanently destroy the very areas

necessary for recovery of the species. It is unlikely that Congress would have intended federal agencies to act with such disregard for the recovery prospects of endangered species. Yet, that would be the practical result of a ruling that land that has been sufficiently altered that it cannot currently be occupied cannot be designated as critical habitat, even though it offers the best prospects for successful restoration of all formerly occupied sites.

FWS may purposefully designate as critical unoccupied habitat that is distant from occupied habitat. Such designation reduces the risk of both the occupied and unoccupied habitat being subject to the same environmental conditions. For example, FWS designated unoccupied habitat as critical for the Bay checkerspot butterfly, because the unoccupied habitat would not be subject to the same rainfall regime as the occupied habitat. 73 Fed. Reg. 50,406-52 (Aug. 26, 2008) (codified at 50 C.F.R. pt. 17). FWS noted in its designation that, "[v]ariations in amount and timing of rainfall play a significant role in determining when host plants become senescent, which in turn influences larval mortality and ultimately is the key factor in the butterfly's population size." *Id.* at 50,415. FWS included "three unoccupied units in San Mateo County, because we recognized that units in close proximity to one another (i.e., many of the units in Santa Clara County) would likely experience similar environmental conditions." *Id.*

There are several reasons, moreover, why unoccupied land may be essential for conservation of a listed

species. For example, in 1980, DOI listed the Coachella Valley Fringe-toed Lizard as Threatened. Endangered and Threatened Wildlife and Plants: Listing as Threatened with Critical Habitat for the Coachella Valley Fringe-Toed Lizard, 45 Fed. Reg. 63,812-20 (Sep. 25, 1980) (codified at 50 C.F.R. pt. 17). The critical habitat designation for the lizard included sandstone cliffs, even though the lizard does not inhabit the cliffs. Erosion of the cliffs supplies sand for the sand dunes where the lizard lives. The lizard does not live on the cliffs, nor could it subsist solely on those cliffs, but the cliffs are necessary to supply sand essential for the lizard's survival and recovery; consequently, they were appropriately designated as critical habitat.

Natural disasters such as wildfires and hurricanes, climate change, and rapid development all could—independently or in combination—make currently occupied habitat inadequate for the recovery of threatened or endangered species. In such cases, it could be crucial that there be unoccupied land designated as critical habitat should currently occupied areas become subsequently inhospitable habitat, and thus allow for the species' survival and recovery.

Some species, like the dusky gopher frog, have been so reduced in range that they cannot recover unless their current range is expanded. *See* J.A. 124 ("The scientific peer reviewers that responded to our original proposed critical habitat rule were united in their assessment that this proposal was inadequate for the conservation of the dusky gopher frog and that we should look within the species' historic range outside

the state of Mississippi for additional habitat for the designation."); J.A. 160 ("In fact, no group of five ponds such as these was found in any of the areas of historical occurrence that we have searched in Mississippi."). The Petitioner's position would have the practical effect of limiting critical habitat to an area insufficient to recover the species.

E. To be designated unoccupied critical habitat, the habitat does not have to be pristine: it can be less than optimal or even degraded habitat.

Petitioner contends that the statute and regulations do not permit designation of critical habitat currently unoccupied by the listed species unless that habitat is fully capable at present of supporting the species and thus members of the species could be successfully relocated on it tomorrow. That is not required by the statutory definition of critical habitat. Nor is it compatible with the purpose of the ESA or its amendments. In this case, the record is clear that Unit 1 *could* likely support an initial breeding population of the dusky gopher frog, but without some additional modification around the ponds the habitat would not be optimal and the frog population might struggle to flourish or grow there.

That unoccupied areas must be presently capable of supporting the species—or that current owners must be willing to make modifications to accommodate species survival—are not statutory conditions or

requirements for designating such areas as critical habitat. While designation of degraded or non-pristine habitat outside the currently inhabited range of a listed species will likely be rare and must be carefully assessed by the reviewers involved, the definition of critical habitat specifically contemplates unoccupied areas as critical habitat, without any limitation that such areas be presently capable of supporting the species. *See* 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened or endangered species means . . . specific areas *outside the geographical area occupied by the species* at the time it is listed. . . ." (emphasis added)). Indeed, the critical habitat designation made here for unoccupied areas was carefully assessed and FWS limited its critical habitat designation. *See* J.A. 159 (noting that FWS identified over sixty ponds in Alabama and declined to designate such areas as critical habitat).

F. Critical habitat designations are not unduly burdensome to private landowners.

Petitioner depicts a parade of burdens that it will face because Unit 1 has been designated critical habitat. Petitioner's position, however, overlooks the fact that a critical habitat designation often imposes little or no burden on private landowners.

Petitioner focuses primarily on the perceived restrictions that could be placed on its use of the land if a proposed action triggered a Section 7 consultation. What Petitioner does not acknowledge is that Section

7 consultation is triggered only if there is a basis for federal involvement in their proposed action, such as funding or issuing a federal permit. Absent that federal nexus, no Section 7 consultation would be necessary should Petitioner continue to use Unit 1 for timber production.

Indeed, it is the amici's experience that Section 7 consultations almost never result in the landowners being barred from moving forward with development of their land. A recent study examined Section 7 consultations between January 2008 and April 2015, and found that *none* of the 88,290 Section 7 consultations during that timeframe resulted in proposed actions being "stopped or extensively altered as a result of FWS finding jeopardy or destruction/adverse modification." Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act,* 112 PNAS 15844 (2015), http://www.pnas.org/content/112/52/15844; *see also* Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141, 164 (2012) ("Like the prior studies, I found that jeopardy and adverse modification determinations are rare. Within the set of biological opinions that I reviewed, FWS found jeopardy 7.2% of the time and adverse modification for 6.7% of eligible opinions."); Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 141 (2004) ("Even in the relatively small number of consultations that result in a finding of jeopardy or adverse modification, the

wildlife agency usually suggests minor project modifications—'reasonable and prudent alternatives'—that allow the project to proceed without violating the Act.").

Petitioner inaccurately contends that a critical habitat designation will cost it $34 million in potential revenue. Petitioner ignores that the Service's economic analysis concluded that the impact of a critical habitat designation would be a range from $0 to $34 million. It is standard practice when making critical habitat designations to provide a range of possible economic costs, given the uncertainties involved in such a projection. These ranges are inherently uncertain and are often subject to much disagreement among economists. *See id.* at 146 ("These attempts to quantify the costs of critical habitat designation in dollar terms clearly involve innumerable layers of simplifying assumptions, each of which is highly vulnerable to attack. While FWS sometimes makes an effort to acknowledge these inherent uncertainties by expressing cost estimates as a range, it is likely that any economist paid to do the job could demonstrate that a different set of reasonable assumptions could lead to a final estimate lower than FWS's low figure or higher than its high figure." (citations omitted)).

In the case where a Section 7 consultation is necessitated for a project on private land, because of a federal nexus, FWS works with the relevant federal agency and the landowner to develop economically reasonable alternatives that would allow the proposed use or project to move forward without further

compromising the listed species. Given the low probability of a Section 7 consultation being triggered at all in the instant case, along with the wide range of projected potential costs, the Service's desire to minimize effects on landowners, and its record of rarely reaching a jeopardy or adverse modification conclusion, Petitioner's concern about the cost of Unit 1's critical habitat designation is unwarranted.

Moreover, DOI regularly works with private landowners to offer a range of options to avoid a determination that would impede the landowner's plans to develop or use the land. For example, DOI offers safe harbor agreements or agrees to enter into Habitat Conservation Plans ("HCPs"). Safe harbor agreements are voluntary agreements between private landowners and the federal government in which the private landowners agree to take actions to aid in the recovery of endangered or threatened species. In exchange for entering into one of these agreements, the federal government agrees that it will not require any additional actions to be taken on the land without the private landowners' consent. *See For Landowners: Safe Harbor Agreements*, https://www.fws.gov/endangered/landowners/safe-harbor-agreements.html (last visited June 15, 2018). Another tool that DOI may use to work with landowners are HCPs. HCPs are plans jointly developed between the private landowner and FWS that allow for economic development of the land that would simultaneously promote conservation for endangered or threatened species. *See Working Together: Tools for*

Helping Imperiled Wildlife on Private Lands, https://www.fws.gov/endangered/esa-library/pdf/ImperiledWildlifeFinalDec2005.pdf (last visited June 15, 2018). FWS regularly enters into both of these types of agreements with private landowners, and they have been successful at furthering the objectives of the ESA. *See, e.g.*, *id.* ("More than 300 landowners have enrolled over 3.6 million acres in 32 Safe Harbor Agreements that protect 36 species listed as endangered or threatened-species such as the northern aplomado falcon, San Joaquin kit fox, and red-cockaded woodpecker."); *id.* ("Since 1987, USFWS has entered into over 35,000 landowner agreements."). In fact, FWS has excluded areas from critical habitat designation where such areas were subject to an HCP or safe harbor agreement. *See, e.g.*, 78 Fed. Reg. 22,626, 22,638 (April 16, 2013) (exercising discretion to exclude units proposed as critical habitat for two plant species that fell within two habitat conservation plans).

II. Judicial Review of FWS's Decisions To Not Exclude Certain Lands from Critical Habitat Designations Would Be Unworkable.

The ESA specifically provides that the decision not to exclude certain lands from critical habitat designations is discretionary. 16 U.S.C. § 1533(b)(2) ("The Secretary *may exclude* any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the

failure to designate such area as critical habitat will result in the extinction of the species concerned." (emphasis added)).

Allowing for judicial review of these decisions is likely to be administratively unworkable and judicially unwieldy. Many critical habitat designations encompass hundreds of thousands of acres and include large numbers of individual parcels, each with a different owner. In such circumstances, there is an almost limitless number of exclusion possibilities, particularly since the exclusion of any one area may make essential the designation of other areas. This is why Congress gave FWS broad discretion to exclude areas but refrained from compelling it to do so whenever a particular standard was met.

The statute gives no guidance to courts reviewing a decision not to exclude certain unoccupied habitat. It lists certain criteria that "may" be considered to exclude a unit of habitat, such as economic cost, but it does not help courts determine when the FWS has abused its discretion *not to exclude* a unit from a designation.

In order to carry out the conservation purpose of the ESA, amici have historically—and correctly—relied on the judgment of the FWS Director, which is heavily rooted in scientific analysis and professional training. This applies particularly to highly complex determinations regarding designation of critical

habitat. Accordingly, courts should similarly defer to the discretionary authority granted to FWS.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR GOPHER FROG EXPERTS AS AMICI CURIAE SUPPORTING FEDERAL RESPONDENTS AND INTERVENOR-RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

Amici Curiae are herpetologists who research and study amphibians and reptiles, with a special emphasis on gopher frogs. They are some of the nation's top experts in amphibian ecology and retain a strong interest in the conservation of the dusky gopher frog. They consider the U.S. Fish and Wildlife Service's (FWS's) critical habitat designation of Unit 1 essential for the conservation of this species. More information about the specific interests and qualifications of the experts is provided below.

Dr. I. Brian Crother is an Edward G. Schlieder Professor in Environmental Studies and Sustainability and is the Assistant Dean of the College of Science and Technology at Southeastern Louisiana University. He coauthored (with Dr. Jeanne Young) the study that elevated *Rana sevosa* to a species and has coauthored other work on dusky gopher frogs. His over 100 publications mostly have covered the ecology and evolution of amphibians and reptiles, including specific long term surveys of amphibians and reptiles in southeastern Louisiana wetlands.

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[1] The parties' blanket consent to the filing of amicus briefs has been lodged with the Clerk of this Court. Pursuant to this Court's Rule 37.6, Amici Curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Dr. C. Kenneth Dodd, Jr. received his Ph.D. in Zoology at Clemson University, Clemson, South Carolina, in 1974. Most of his career was with the U.S. Department of Interior: Office of Endangered Species 1976-1984 (as Staff Herpetologist) and the Research division of the U.S. Fish and Wildlife Service, later transferred to the U.S. Geological Survey (USGS; 1984–2007), where he served as Project Leader of the USGS Amphibian Research and Monitoring Initiative in the southeastern United States. He is currently Courtesy Associate Professor in the Department of Wildlife Ecology and Conservation at the University of Florida. Dr. Dodd has published more than 220 papers, reviews, and books, mostly on reptile and amphibian ecology, conservation, and management. His book *Frogs of the United States and Canada* was published by Johns Hopkins University Press in 2013, and an edited volume *Amphibian Ecology and Conservation: A Handbook of Techniques* was published by Oxford University Press in 2010.

Dr. Steve A. Johnson is an Associate Professor of Wildlife Ecology at the University of Florida in Gainesville. He holds a Ph.D. from the University of Florida and B.S. and M.S. degrees from the University of Central Florida. Dr. Johnson's area of expertise is natural history and conservation of amphibians and reptiles. Prior to his employment at UF, he worked as a Research Wildlife Biologist for the US Geological Survey's Amphibian Research and Monitoring Initiative. He and his students have studied gopher frogs in northern Florida for more than 20 years. In 2018, he

received the Paul Moler Herpetological Conservation Award for his career-long commitment to conservation of amphibians and reptiles.

Dr. Michael Lannoo is a professor at Indiana University and an affiliate of the Illinois Natural History Survey at the University of Illinois, and Purdue University. Over the past decade, he has published 29 papers on the biology of crawfish frogs (*Rana areolatus*), sister species to the gopher frog group. Subjects of these papers include natural history (burrow habitation, timing of breeding, breeding migrations, climate effects), ecology (demographics, metapopulation dynamics), population survey methods, genetics, disease, and colonization and use of post-industrial landscapes. In 2001, he received the Parker/Gentry Award for Excellence and Innovation in Conservation Biology from The Field Museum of Natural History, Chicago, IL. This award honors "an outstanding individual, team or organization whose efforts are distinctive and courageous and have had a significant impact on preserving the world's natural heritage, and whose actions and approaches can serve as a model to others."

Dr. Joseph C. Mitchell is currently a research associate with the Florida Museum of Natural History and partially retired. His Ph.D. is in ecology from the University of Tennessee. He owns his own environmental consulting business. He has worked on a wide array of conservation issues for the U.S. Forest Service, Fish and Wildlife Service, National Park Service, 20 Navy and Marine installations for the Department of Defense, The Nature Conservancy, and numerous private

environmental companies on private lands. Most of his 150 reports to these agencies are on conservation issues involving amphibians (frogs and salamanders). He served the NGO Partners in Amphibian and Reptile Conservation (PARC) Management Working Group as member and chair (2000–2009). He originated the acclaimed *Habitat Management Guidelines for Amphibians and Reptiles in the United States* series for PARC. He has written over 400 scientific articles, wildlife magazine articles, natural history notes, book reviews, and eight books.

Dr. Stephen C. Richter is a Professor of Biology and Associate Director of the Division of Natural Areas at Eastern Kentucky University. He has been studying gopher frogs since 1995, served as a peer reviewer for the FWS's critical habitat designation, and has published 16 of his 49 scientific papers and book chapters on the natural history, population genetics, and conservation biology of gopher frogs. He has co-taught courses on wetland restoration, and his primary research (13 publications to date) is heavily focused on wetlands, amphibians that require ephemeral wetlands for successful reproduction (similar to gopher frogs), and best management practices for wetland restoration.

Dr. Richard A. Seigel is Professor of Biology in the Department of Biological Sciences at Towson University in Maryland. He received his B.S. in Zoology & Physiology from Rutgers University, his M.S. in Biology from the University of Central Florida, and his

Ph.D. in Systematics and Ecology from the University of Kansas. His major research interests are in the population ecology and conservation biology of amphibians and reptiles, especially snakes, turtles, and frogs. He has published over 90 peer-revised papers and five books on the ecology and conservation of amphibians and reptiles and was named the winner of the 2013 Paul Moler Herpetological Conservation Award from the Florida Chapter of the Wildlife Society. He was the lead researcher on the ecological studies of the dusky gopher frog in Mississippi from 1995–2001.

Dr. William Sutton is an Assistant Professor of Wildlife Ecology at Tennessee State University in Nashville, Tennessee. Dr. Sutton's research program focuses primarily on the impacts of disturbance (natural and anthropogenic disturbances) on wildlife populations. His research also includes habitat modeling for rare and endangered species, such as amphibians and reptiles. In addition to his academic responsibilities, Dr. Sutton is involved with the Southeastern Partners in Amphibian and Reptile Conservation (SEPARC) and has served as the co-chair and long-term steering committee member. Dr. Sutton has worked with the dusky gopher frog in the context of evaluating the susceptibility of the species to amphibian pathogens, including ranaviruses.

Dr. Nikki Thurgate is a senior research fellow at La Trobe University. She holds a B.S. from James Cook University and a Ph.D. from the University of New Orleans. She has expertise in animal ecology and

management. She has worked on a number of endangered species globally to try to understand why certain species become extinct while others persist. Her Ph.D. research was on dusky gopher frogs in Mississippi (6 years) and she went on to work with gopher frogs in North Carolina for an additional 3 years.

Dr. Jeanne Young holds a B.S. from Louisiana State University, a M.S. from Southeastern Louisiana University and a Ph.D. from Charles Darwin University. She has expertise in ecological physiology and evolutionary biology of reptiles and amphibians. Her M.S. investigated reproduction, movement patterns and population genetics of gopher frogs. Her Ph.D. research investigated evolutionary and physiological correlates of ecology of hylid frogs in the Northern Territory of Australia.

SUMMARY OF ARGUMENT

The dusky gopher frog is at extremely high risk of extinction in the wild. With only one viable population in Mississippi facing a myriad of identifiable but unpredictable threats such as drought and disease, it is essential that populations outside of Mississippi be established. Unit 1 was home to dusky gopher frogs in the mid-1960s, is distant enough from the existing populations that it would likely be unaffected by events which pose a risk to the continued existence of the Mississippi populations, and contains the rare ephemeral

ponds which serve as breeding habitat for the dusky gopher frog. The rarity of these ponds in the dusky gopher frog's historical range and the difficulty of creating them render the ponds and their surrounding uplands essential for conservation of this species. Unit 1 also contains upland habitat, which, while not ideal, is nonetheless suitable for the dusky gopher frog and can be restored to optimal conditions.

ARGUMENT

I. The Dusky Gopher Frog is Critically Endangered.

The dusky gopher frog (also referred to as the Mississippi gopher frog), *Rana sevosa* (= *Lithobates sevosus*), historically occupied three states – Louisiana, Mississippi, and Alabama – and was once abundant in coastal Mississippi.[2] The species was historically fairly common in distribution, but a drastic loss of habitat

[2] AR 33 (M. Graham Netting & Coleman J. Goin, *Additional notes on Rana sevosa*, 1942 Copeia 259, 259); AR 963 (Michael A. Sisson, Monitoring Reproductive Activity of the Mississippi Gopher Frog and Evaluating Ponds for Suitability as Gopher Frog Release Sites 1 (2003)); AR 1552 (Stephen C. Richter et al., *Genetic Consequences of Population Reduction and Geographic Isolation in the Critically Endangered Frog, Rana sevosa*, 2009 Copeia 799, 801, 802).

has decimated the population.[3] Estimates at the time of the critical habitat designation number the total adult population at only approximately 100 individual frogs in Mississippi.[4]

Currently, a single viable population of the dusky gopher frog is known to exist, a natural population in a pond in the DeSoto National Forest in southern Mississippi known as Glen's Pond.[5] Recently, the Glen's Pond population has not thrived: in 2016 only 11 juvenile frogs were counted in surveys of Glen's Pond, and in 2017 surveys reflected that no natural juveniles were produced at Glen's Pond.[6] At the time of critical

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[3] Stephen C. Richter & John B. Jensen, *Rana sevosa Goin and Netting, 1940, in* Amphibian Declines 584, 584 (Michael Lannoo ed., Univ. of Cal. Press 2005), excerpt available at https://amphibiaweb.org/species/5939; AR 1243-1244 (Nicole Y. Thurgate & Joseph H.K. Pechmann, *Canopy Closure, Competition, and the Endangered Dusky Gopher Frog*, 71 J. Wildlife Mgmt. 1845, 1845-1846 (2007)).

[4] AR 2146 (U.S. Fish & Wildlife Service, Mississippi Gopher Frog Fact Sheet 2 (2012)). In its 2015 5-Year Review, FWS estimated the total number of adult frogs at that time to be 160, though the vast majority of those individuals – 135 – are reported as occurring in only one location: Glen's Pond. U.S. Fish and Wildlife Service, 5-Year Review: Summary and Evaluation 8-9 (2015) ("5-Year Review").

[5] *See* Joseph H.K. Pechmann et al., Research on Conservation and Recovery of the Endangered Dusky (Mississippi) Gopher Frog, Period of Performance: 1 January 2012–31 December 2016 3-4 (2017) (unpublished report, on file with the author); 5-Year Review at 3.

[6] Pechmann et al., *supra* note 5, at 3; Joseph H.K. Pechmann et al., Research on Conservation and Recovery of the Endangered Dusky (Mississippi) Gopher Frog, Period of Performance: 1

habitat designation, two other small, vulnerable populations existed in Mississippi near Glen's Pond: 1) Mike's Pond, the only known existing natural population outside of Glen's Pond, located approximately 20 miles east of Glen's Pond, and 2) McCoy's Pond, located approximately 16 miles east of Mike's Pond.[7]

The last remaining breeding population of dusky gopher frogs at Glen's Pond represents the only viable population within what was historically a complex metapopulation, which contained multiple connected populations with breeding wetlands across a landscape of continuous upland habitat.[8] FWS defines a viable population as "one that is large enough to maintain sufficient genetic variation to enable it to evolve and respond to natural habitat and environmental changes, and exhibits parameters consistent with a stable or increasing reproductive rate, without the addition of frogs raised in artificial environments or

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January 2017–22 February 2018 6 (unpublished report, on file with author).

[7] J.A. 148; *see also* 5-Year Review at 9 (citing distances between ponds). The population at McCoy's Pond is likely extinct. *Id.* ("No dusky gopher frogs have been observed at [McCoy's Pond] since a frog was heard calling there in 2004."). The population at Mike's Pond may be extinct as well. *Id.* (citing 2013 as last record of the frog at Mike's Pond); *see also* Pechmann et al., *supra* note 5. There are ongoing habitat restoration and gopher frog translocation efforts at several sites in Mississippi, including at a pond established by The Nature Conservancy, but none of these populations are established and self-sustaining. Pechmann et al., *supra* note 5.

[8] AR 1552, 1554 (Richter et al., *supra* note 2, at 802, 804).

introduced from other populations."[9] Dusky gopher frogs are pond breeding amphibians and each subpopulation is organized around a breeding pond and the adjoining upland habitat. Each subpopulation in turn interacts with the various adjoining subpopulations. The resulting network of connectivity between ponds and subpopulations establishes a metapopulation structure across the wider landscape.[10]

It is because of this very small total number of frogs with only one known viable population that the U.S. Fish and Wildlife Service correctly listed the species as Endangered under the U.S. Endangered Species Act, and the International Union for Conservation of Nature and Natural Resources (IUCN) listed it as Critically Endangered on its Red List.[11] A species is considered Critically Endangered when it is "facing an extremely high risk of extinction in the wild."[12] Data indicate that the dusky gopher frog is one of the most

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[9] 5-Year Review at 34.

[10] AR 1552 (Richter et al., *supra* note 2, at 802). FWS accurately states: "To be a viable population, a dusky gopher frog population must be a metapopulation." 5-Year Review at 34 (emphasis omitted).

[11] Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993 (Dec. 4, 2001); The IUCN Red List of Threatened Species, 2008, http://www.iucnredlist.org/static/categories_criteria_3_1 (last visited June 27, 2018).

[12] *Id.*

endangered, if not *the* most endangered, species of amphibian in the United States.[13]

The species faces a variety of threats, but FWS accurately found that the primary threat is the degradation, destruction, and fragmentation of suitable habitat.[14] As a terrestrial amphibian, the dusky gopher frog is especially vulnerable to alteration, loss, and fragmentation of habitat. Thus, FWS has appropriately focused on locating, protecting, and restoring suitable habitat.

While no dusky gopher frogs have been found in Louisiana since the mid-1960s or in Alabama since 1922, one of the last observed locations of the dusky gopher frog in Louisiana was within the critical habitat now designated by the FWS as Unit 1.[15]

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[13] AR 1662 (Richard A. Seigel, Comments (2011)); *see also* AR 1243 (Thurgate & Pechmann, *supra* note 3).

[14] 66 Fed. Reg. at 62,994.

[15] J.A. 167 (Designation of Critical Habitat for Dusky Gopher Frog Final Rule, 77 Fed. Reg. 35,118, 35,135 (June 12, 2012)) ("It is currently unoccupied; however, the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within this unit."); *see also* AR 3098-3104; AR 1099, 1103 (Joseph H.K. Pechmann et al., Survey for Critically Imperiled (S1) Pond-Breeding Amphibians in St. Tammany Parish, Louisiana 10, 14 at Table 1 (2006)). An additional record from 1967 reflects the dusky gopher frog located in the same area as Unit 1: "Dusky Gopher Frogs were known from the flatwoods areas north of Lake Pontchartrain, from near Ponchatoula to Slidell, and north on the tableland west of the Pearl River to near Bush. They were last found in Louisiana in 1967 near Hickory, St. Tammany Parish, by graduate students from the University of Louisiana at Lafayette." Jeff Boundy & John L. Carr, Amphibians & Reptiles of Louisiana 138

II. Unit 1 is Essential to the Conservation of the Dusky Gopher Frog.

In 2011, FWS conducted a habitat assessment of the St. Tammany Parish, Louisiana, property ultimately designated as Unit 1 and found five ephemeral ponds and associated upland terrestrial habitat.[16] We agree with the FWS that the 1,544 acres in Unit 1 are essential for the conservation of the dusky gopher frog. FWS correctly concluded that the Unit 1 critical habitat is essential for the conservation of the dusky gopher frog based on its accurate findings that Unit 1 "provides: (1) breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity."[17]

The ephemeral ponds located in Unit 1 represent the best remaining breeding habitat for the dusky gopher frog known to exist in Louisiana.[18] Further, the

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(La. State Univ. Press 2017); *see also* J.A. 127 (Alabama historical record).

[16] J.A. 160.

[17] J.A. 126. FWS uses the term "stochastic" to describe periodic natural events or existing or potential human-induced events. J.A. 157.

[18] J.A. 53 (Joseph H.K. Pechmann, Peer Review Comments (2011)) ("The critical habitat proposed in Unit 1 contains the best gopher frog habitat remaining in Louisiana, to my knowledge, and some of the best breeding ponds available anywhere in the

FWS was correct in concluding that "[b]ased on the best scientific information available to the Service, the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog."[19] It is indisputable that the dusky gopher frog was historically found in Unit 1 and that one of the last known locations of the frog in Louisiana was in a pond within Unit 1.[20] If reintroduced to Unit 1, these ponds would support dusky gopher frog reproduction.

A. The Dusky Gopher Frog's Breeding Habitat is Rare.

Adult dusky gopher frogs range in size from 56–105 mm (2.2–4 inches).[21] The dusky gopher frog breeds in small ephemeral ponds that lack fish, and it spends the majority of its life in and around underground burrows found in the upland forest habitat surrounding the breeding pond.[22] The ponds are referred to as

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historical range of *R. sevosa*. I strongly agree with the Service's determination that this area is essential for the conservation of *R. sevosa*.").

[19] J.A. 125; *see also* J.A. 160 ("In fact, no group of five ponds such as these was found in any of the areas of historical occurrence that we have searched in Mississippi.").

[20] AR 1099, 1103 (Pechmann et al., *supra* note 15); *see also* Boundy & Carr, *supra* note 15 and J.A. 160, 167.

[21] Richter & Jensen, *supra* note 3, at 585.

[22] 66 Fed. Reg. at 62,994; *see also* AR 870, 873 (Stephen C. Richter et al., *Postbreeding Movements of the Dark Gopher Frog, Rana sevosa Goin and Netting: Implications for Conservation and Management*, 35 J. Herpetology 316, 316, 319 (2001)).

ephemeral because they fill with water and completely dry out over a cyclical period of time.[23] Dusky gopher frog breeding ponds must be ephemeral and geographically isolated from other waterbodies in order to ensure the absence of predacious fish, which cannot survive the dry cycle of the pond.[24] The frog's breeding season is directly dependent on the hydrological cycle of the local ecosystem.[25] When seasonal winter rainfall sufficiently fills the shallow ephemeral ponds, the male frogs move to the ponds and call to the females.[26] In years without sufficient rainfall, the males will not move to the ponds and breeding typically will not occur.[27]

During breeding, females attach clusters of eggs to vertical emergent vegetation within the pond. After the breeding cycle, adult frogs return to upland

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[23] J.A. 151.

[24] *See* 66 Fed. Reg. at 62,999 ("Predation from fish probably contributed to the loss of historic populations. Temporary ponds altered to form more permanent bodies of water and stocked with fish are no longer suitable breeding sites.").

[25] J.A. 151.

[26] *See* AR 895 (Stephen C. Richter & Richard A. Seigel, *Annual Variation in the Population Ecology of the Endangered Gopher Frog, Rana sevosa Goin and Netting*, 2002 Copeia 962, 966); *see also* AR 945 (Stephen C. Richter et al., *Stochastic Variation in Reproductive Success of a Rare Frog, Rana sevosa: Implications for Conservation and for Monitoring Amphibian Populations*, 111 Biological Conservation 171, 172 (2003)).

[27] *See* AR 898 (Richter & Seigel, *supra* note 26, at 969); *see also* J.A. 52 (Joseph H.K. Pechmann, Peer Review Comments (2011)).

burrows.[28] Following metamorphosis, juvenile frogs also move to the burrows in the surrounding upland habitat.[29] The ephemeral ponds often dry by early to mid-summer. Frogs will remain in the upland habitat until the following breeding season.

Further, the dusky gopher frog requires that the ponds have an open canopy, and it uses emergent and submerged vegetation for egg attachment by female frogs.[30] Research suggests that open pond canopies are particularly important as this characteristic has a direct effect on tadpole development and metamorphosis.[31] Water in the pond must be free of pollution, suspended sediment, and road runoff as these impurities impair larval development.[32] The ephemeral pond must contain water for sufficient periods to allow adequate time for hatching, development, and metamorphosis of the larvae.[33]

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[28] 66 Fed. Reg. at 62,994.

[29] J.A. 150; *see also* AR 1412 (Elizabeth A. Roznik & Steve A. Johnson, *Burrow Use and Survival of Newly Metamorphosed Gopher Frogs (Rana capito)*, 43 J. Herpetology 431, 432 (2009)).

[30] AR 1248 (Thurgate & Pechmann, *supra* note 3, at 1850); Richter & Jensen, *supra* note 3, at 585.

[31] AR 1243 (Thurgate & Pechmann, *supra* note 3).

[32] J.A. 152 ("An unpolluted wetland with water free of predaceous fish, suspended sediment, pesticides, and chemicals associated with road runoff is important for egg development, tadpole growth and development, and successful mating and egg-laying by adult frogs.").

[33] J.A. 151, 153; *see also* AR 1243 (Thurgate & Pechmann, *supra* note 3, at 1845).

This combination of necessary features – ponds which retain the right amount of water for only limited days in the year, number several in a particular location, are isolated, contain vertical emergent vegetation, have an open canopy, and contain water free of pollution – is rare in the dusky gopher frog's historical range.[34] We agree with the FWS's focus on this element of the frog's habitat because "their rarity in the environment is one of the primary reasons that the frog is endangered."[35]

B. Habitat Geographically Remote from the Existing Gopher Frog Populations is Essential to the Conservation of the Species.

The gopher frog populations in Mississippi face a high risk of extinction from stochastic events – threats posed by disease and other events for which occurrences vary in space and time. These include, but are not limited to, events such as drought or flooding and genetic bottlenecks and inbreeding associated with low population sizes.[36] Due to the gopher frog's overall low

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[34] *See* J.A. 125 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."); *see also id.* (describing unsuccessful searches for similar pond habitat in Alabama, described as unsuitable because the "ponds contained woody shrubs and trees, were occupied by fish, occurred within agricultural fields, and/or were surrounded by trailers and houses.").

[35] J.A. 158; *see also* J.A. 126.

[36] J.A. 115.

numbers and its isolation to a relatively small geographic area, these threats which are typically localized in impact thus loom large over the entire extant population; a single outbreak poses a risk of extinction.[37]

For example, in 2003 a majority of the dusky gopher frog tadpoles at Glen's Pond were killed by an unknown disease.[38] With only one breeding site, the disease effectively eliminated any population increase that would have occurred due to reproduction during the 2003 breeding season.[39] While this disease did not appear to impact adult dusky gopher frogs, it continues to be present in the Glen's Pond site.[40]

Drought and decreased rainfall threaten all life stages of the dusky gopher frog. The amount and timing of precipitation can have dramatic effects on ephemeral breeding ponds, even resulting in years where zero reproduction occurs.[41] Additionally, studies on the related *Rana* (= *Lithobates*) *capito* reflect a

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[37] *See* J.A. 52-53 (Pechmann, *supra* note 18 ("Due to the low number of remaining populations and its very restricted range, *R. sevosa* may be at risk of extirpation from events such as drought or disease which vary over space and time. Maintaining sites over the entire range of *R. sevosa* into which it could be translocated is essential to decrease the potential risk of extinction of the species from events such as these and provide for the species' eventual recovery.")).

[38] AR 967 (Sisson, *supra* note 2, at 5).

[39] *Id.*

[40] Pechmann et al., *supra* note 5, at 51-52.

[41] AR 1816 (Society for the Study of Amphibians and Reptiles (SSAR), Comments 2 (2011)); J.A. 126.

significant positive relationship between reproduction and rainfall during the breeding season.[42] Eggs and larvae are particularly vulnerable to desiccation (drying out) if sufficient water does not remain in the ponds, but changes in precipitation may also affect juvenile and adult survivorship in the frog's post-metamorphosis stage when it moves out of the breeding ponds into upland habitat.[43] Additionally, climate change poses a particular threat to the continued existence of the dusky gopher frog.[44] Climate change will have a heightened impact on dusky gopher frogs and other amphibians because they cannot easily disperse to areas with different climate regimes, especially given their limited dispersal distances and the barriers created by fragmented habitats.[45] Hydrological

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[42] AR 1531 (John B. Jensen et al., *The Relationship Between Breeding by the Gopher Frog, Rana capito (Amphibia: Ranidae) and Rainfall*, 150 Am. Midland Naturalist 185, 185 (2003)).

[43] Cynthia Carey & Michael A. Alexander, *Climate Change and Amphibian Declines: Is There a Link?*, 9 Diversity and Distributions 111, 114 (2003), https://www.researchgate.net/publication/230033657_Climate_change_and_amphibian_declines_Is_there_a_link ("Because most amphibians lay eggs in standing water, eggs and larvae are particularly vulnerable to desiccation.") (internal citation omitted); J.A. 126 and AR 1416 (Roznik & Johnson, *supra* note 29, at 435).

[44] AR 1469 (Joshua J. Lawler et al., *Projected Climate Impacts for the Amphibians of the Western Hemisphere*, 24 Conservation Biology 38, 38 (2010)); *see also* J.A. 126.

[45] Carey & Alexander, *supra* note 43 ("Because temperature and moisture have such pervasive effects on amphibian biology, including reproduction, and because of their limited mobility, amphibians should be relatively vulnerable to the effects of rapid climate change, compared to other terrestrial vertebrates.").

changes to any of the ponds at currently occupied sites could result in extinction of that population and threaten survival of the species.[46] Thus, as noted by peer reviewer Stephen Richter: "Multiple breeding ponds will provide variation in the length of time ponds hold water (hydroperiod) across the landscape and will increase probability that reproductive success occurs in one or more ponds in a given year."[47]

Because of the significant risk posed by drought, disease and other threats, restricting critical habitat designation to sites in Mississippi is not sufficient for conservation of the dusky gopher frog. We agree with peer reviewer Joseph Pechmann that "Potential *R. sevosa* translocation sites must be spread out over as wide a geographic area as possible because events such as droughts and disease tend to be spatially autocorrelated. Therefore, [the dusky gopher frog] will be less at risk of extinction if populations [] are established across its range in Louisiana and Alabama, rather

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[46] SSAR Comments, *supra* note 41, and J.A. 126; *see also* Richard A. Seigel et al., *Using Well Water to Increase Hydroperiod as a Management Option for Pond-Breeding Amphibians*, 34 Wildlife Soc. Bulletin 1022, 1025 (2006), https://doi.org/10.2193/0091-7648(2006)34[1022:UWWTIH]2.0.CO;2 ("When populations become isolated, as is true for dusky gopher frogs at Glen's Pond, the effects of annual reproductive failure escalate and can result in extinction of such isolated populations. When there are only a limited number of populations, such a local extinction may be unacceptable. In fact, *R. sevosa* appears susceptible to extinction following complete reproductive failure from 4 to 5 consecutive years of low rainfall.").

[47] AR 1541 (Stephen C. Richter, Peer Review Comments 3 (2010)).

than just in southern Mississippi."[48] As FWS noted in its Final Rule: "The scientific peer reviewers that responded to our original proposed critical habitat rule were united in their assessment that this proposal was inadequate for the conservation of the dusky gopher frog and that we should look within the species' historic range outside the state of Mississippi for additional habitat for the designation."[49]

In sum, the FWS correctly concluded that "Unit 1 is essential to the conservation of the dusky gopher frog because it provides . . . geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity."[50]

C. The Unique Qualities of Unit 1 Make It Essential for the Conservation of the Dusky Gopher Frog.

Ephemeral ponds are the product of a complex balance of hydrology and are difficult to artificially create.[51] FWS describes lengthy efforts it engaged in with

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[48] J.A. 53; *see also* J.A. 39 (Stephen C. Richter, Peer Review Comments (2011)) ("I applaud the proactive designation of multiple areas currently unoccupied by the species but that represent promising sites for reintroductions to what appear to be historic breeding ponds and surrounding uplands. These additional sites truly are essential to the conservation of the species.").

[49] J.A. 124.

[50] J.A. 126.

[51] Joseph H.K. Pechmann et al., *Amphibian Colonization and Use of Ponds Created for Trial Mitigation of Wetland Loss*, 21

the U.S. Forest Service to create a single ephemeral pond in the DeSoto National Forest, explaining: "It has taken 10 years to reach the point where we consider this pond ready to be used as a reintroduction site, and its value as a breeding site has not yet been proven."[52] We agree with the FWS that "[i]t is highly unlikely that five ponds, similar to those that currently exist in Unit 1, could be created in the landscape within a timeframe that would provide near-term conservation benefits to the dusky gopher frog."[53]

Thus, the existence and excellent condition of the five ephemeral ponds in Unit 1 render it essential for the conservation of the dusky gopher frog. The ponds are ephemeral and geographically isolated from other water sources.[54] As such, they can serve as breeding habitat and a predator-free site for the larvae and tadpoles to develop. The ponds are open canopied with

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Wetlands 93, 96, 106-107 (2001), https://srelherp.uga.edu/projects/docs/rbay/RefugePonds-2001.pdf (describing initial difficulty in achieving water retention in created pond; that problem was resolved by the installation of a plastic liner, which then made the pond permanent rather than ephemeral); Charlene D'Avanzo, *Long-Term Evaluation of Wetland Creation Projects*, *in* 2 Perspectives, Wetland Creation and Restoration: The Status of the Science 75, 75 (John A. Kusler and Mary E. Kentula eds., USEPA 1989), https://www.epa.gov/sites/production/files/2015-08/documents/wetland_creation_and_restoration_-_the_status_of_the_science_vol_2_1.pdf.

[52] J.A. 122-123. This constructed pond has yet to support a viable population. 5-Year Review at 3, 9-10.

[53] J.A. 123.

[54] J.A. 123, 125.

good water quality.[55] Surveys in the 1990s and 2000s noted that the ephemeral ponds in what is now Unit 1 were "considered similar in appearance (water clarity, depth, vegetation) to ponds in Mississippi used for breeding by the dusky gopher frog."[56] In 2011, FWS conducted a habitat assessment of Unit 1 and concluded that the five ephemeral ponds were "intact and remarkable quality" and "determined that [the] five isolated, ephemeral wetlands in that area are similar to ponds where dusky gopher frogs currently breed in Mississippi."[57]

Of equal importance to the high quality of Unit 1's ephemeral ponds is the existence of several of them within close proximity of one another. The FWS was correct in concluding that "the five ponds are in close enough proximity to each other that adult frogs could move between them and create a metapopulation."[58] This network of five ponds would support separate

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[55] AR 1097 (Pechmann et al., *supra* note 6, at 8 ("Water quality is good in all seven ponds we measured it in. . . ."); *id.* at 1099 (noting that "open canopy temporary ponds are very rare. The few open canopy ponds we surveyed included the two historic sites for *R. sevosa* we were able to locate.").

[56] J.A. 160 (citing Robert A. Thomas & Amelia G. Ballew, *Survey for Dusky Gopher Frog (Rana capito sevosa), Populations in St. Tammany Parish, Louisiana: 1996-1997* (1997); Norman E. Leonard et al., *Survey for Rana sevosa and Abystoma tigrinum, Two Critically Imperiled (S1) Pond-Breeding Amphibians in St. Tammany Parish, Louisiana* (2003); and Joseph H.K. Pechmann et al., *Survey for Critical Imperiled (S1) Pond-Breeding Amphibians in St. Tammany Parish, Louisiana* (2006)).

[57] J.A. 124-125, 160.

[58] J.A. 167.

breeding subpopulations and could result in the emergence of a metapopulation within the geographic area of Unit 1.[59] Outside of Glen's Pond, this framework is unique within the historical range of the dusky gopher frog and, therefore, essential.[60]

D. Unit 1 is Essential Despite Its Lack of Optimal Upland Habitat.

The FWS correctly identified upland forested nonbreeding habitat and upland habitat connecting the breeding and nonbreeding habitat as primary elements of dusky gopher frog habitat.[61] Unit 1 possesses upland forest nonbreeding habitat and connectivity habitat, though not in optimal conditions.

Essentially, as FWS stated, the frog's upland nonbreeding habitat must provide for "food, shelter, and protection from the elements and predation."[62] Traditionally, the dusky gopher frog's upland habitat consisted of longleaf pine savannah, and this remains optimal for the frog's upland habitat, leading FWS to describe the existing loblolly pine plantation upland

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[59] *Id.*; *see also* AR 1664 (Joseph C. Mitchell, Comments 1 (2011)).

[60] J.A. 125. The cattle watering tanks being used to artificially raise tadpoles to metamorphosis are not a replacement for the ephemeral pond breeding habitat. These tanks can only be used in conjunction with wild breeding ponds, where scientists gather the frog eggs and ultimately release the metamorphs. *See* 5-Year Review at 7.

[61] J.A. 153-154.

[62] *Id.* at 153.

habitat on Unit 1 as poor quality terrestrial habitat.[63] However, FWS also accurately concluded that the Unit 1 uplands are restorable to longleaf pine with reasonable effort.[64]

Further, even in its current state, Unit 1's uplands could provide the necessary food, shelter, and protection from the elements and predation that the dusky gopher frog requires. In other words, it is currently suitable upland habitat. First, evidence indicates that Unit 1 already has stump holes, which the frog uses for shelter from predators and protection from desiccation and extreme temperatures. Dr. Joseph Pechmann's field notes from his Unit 1 site visit in 2011 identified the existence of "some stumps and stump holes around pond."[65]

Second, a number of sources document gopher frogs living on less than ideal upland habitat, including pine plantations. A report produced by the National Council for Air and Stream Improvement found that the Carolina gopher frog – *Rana capito* – was present at 17 ponds on forest industry lands, i.e., pine plantations.[66] The report stated: "Gopher frogs (17

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[63] *Id.* at 160.

[64] *Id.* at 167.

[65] AR 3101; *see also* J.A. 14. A 1997 survey also noted the presence of armadillo burrows on the Unit 1 uplands, which the researchers indicated "should substitute." AR 559 (Thomas & Ballew, *supra* note 56, at 6).

[66] National Council for Air and Stream Improvement, Final Report, Southeast Coastal Plain Amphibian Survey, NFWF

ponds) were not common [on forest industry lands], but were identified at ponds more often than some other species perceived as relatively common."[67] *Rana capito* has also been documented to live on intensely managed Florida pine plantations, albeit at significantly lower levels than on adjacent national forest lands.[68] This demonstrates that commercial pine plantations can serve as terrestrial habitat for *Rana capito*, although they would not be considered optimal habitat for this species either. *Rana sevosa* and *R. capito* are closely related sister species which have very similar habitat requirements.[69] Beyond pine plantations, *Rana capito* has also been documented living in heterogeneous upland habitat that includes fire-suppressed, closed-canopy pines clumped together near breeding ponds.[70] The study documented juvenile frogs moving from breeding ponds to both open-canopy

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Project #97-074 (1999) Table 2 (unpublished report, on file with author).

[67] *Id.* at 33.

[68] D. Bruce Means & Ryan C. Means, *Effects of Sand Pine Silviculture on Pond-breeding Amphibians in the Woodville Karst Plain of North Florida, in* Amphibians and Reptiles: Status and Conservation in Florida 56, 58 (Walter E. Meshaka & Kimberly J. Babbitt, eds., Krieger Publishing Co. 2005).

[69] Richter & Jensen, *supra* note 3; *see also* AR 1412 (Roznik & Johnson, *supra* note 29, at 431).

[70] AR 1413, 1416 (Roznik & Johnson, *supra* note 29, at 432, 435).

and closed-canopy upland areas; juveniles from both groups survived.[71]

Third, the fact that the dusky gopher frog was documented in Unit 1 twice in the mid-1960s demonstrates that the dusky gopher frog persisted in Unit 1 for decades while it was a pine plantation.[72] Indeed, the authors of a 1997 survey of the land now designated as Unit 1, who viewed the ponds and their surrounding upland habitat, commented: "There is no reason to believe that the land cannot support Dusky Gopher Frogs."[73] The authors of a 2006 survey of St. Tammany Parish ponds, which included Unit 1, stated the following regarding the near universal presence of pine plantations at all the St. Tammany sites: "[I]t is likely that pine plantations represent a type of land use far more preferable to amphibians than residential housing or more intensive types of agriculture."[74]

Finally, because all but two percent of the original longleaf pine forests within the historic range of the frog have been destroyed, FWS must find and restore

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[71] AR at 1413-1414, 1416. In fact, although juvenile *Rana capito* frogs prefer open-canopy upland habitat, the study reflected that the survival rate was higher for the juveniles in the closed-canopy upland habitat over those in the open canopy uplands. *Id.* at 1415-1417.

[72] J.A. 167; *see also* AR 3098-3104; Boundy & Carr, *supra* note 15; and J.A. 32 (P&F Lumber, Comment (2011) (noting that the Poitevent patriarch acquired the property in the 1880s and formed a lumber company)).

[73] AR 557 (Thomas & Ballew, *supra* note 56, at 4).

[74] AR 936 (Leonard et al., *supra* note 56, at 6).

degraded upland habitats if the dusky gopher frog is to recover.[75] Therefore, while the upland habitat in Unit 1 may not be ideal, it contains elements required by the dusky gopher frog, and those elements in less than optimal condition are restorable with a reasonable effort.

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fifth Circuit upholding FWS's designation of Unit 1 as critical habitat, as Unit 1 is essential for the conservation of the dusky gopher frog.

Respectfully submitted this 6th day of July, 2018,

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[75] *See* 66 Fed. Reg. at 62,995.

No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER CO.,

Petitioner,

v.

U.S. FISH & WILDLIFE SERVICE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

Amicus curiae addresses an issue that Petitioner and its supporters raise in relation to the second question presented. The second question is:

Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.

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INTEREST OF THE AMICUS CURIAE[1]

The Institute for Policy Integrity at New York University School of Law[2] ("Policy Integrity") is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in administrative law, economics, and public policy. Policy Integrity is a collaborative effort of faculty; a full-time staff of attorneys, economists, and policy experts; and law students.

An area of special concern for Policy Integrity is the promulgation of rational environmental regulations justified by balanced cost-benefit analysis. Policy Integrity has specific expertise in the proper scope and estimation of costs and benefits, as well as in the application of economic analysis to regulatory decisionmaking. Our director, Richard Revesz, has published extensively on the need for federal agencies to thoroughly assess both ancillary benefits and unquantified benefits. *See, e.g.*, Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 Cal. L. Rev. 1423 (2014); Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. Chi. L. Rev. 1763 (2002). Policy Integrity has

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[1] The parties have submitted letters to the Clerk granting blanket consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] No part of this brief purports to present New York University School of Law's views, if any.

previously submitted amicus briefs to this Court on ancillary benefits and unquantified benefits. *See* Policy Integrity *Amicus* Br., *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46).

Petitioner and their amici invite the Court to use the second question presented in this case as an opening to comment on the merits of how the Fish and Wildlife Service (FWS) weighed the costs and benefits of a critical habitat designation. Petitioner and their amici specifically encourage this Court not to take into account important ancillary and unquantified benefits. Consequently, Policy Integrity has a significant interest in this Court's framing and resolution of the second question presented.

SUMMARY OF THE ARGUMENT

After qualitatively assessing both the direct conservation benefits to the dusky gopher frog and the ancillary benefits to property values, coexisting species, ecosystem services including water quality, aesthetic values, and recreational opportunities, the Fish and Wildlife Service (FWS) decided not to exclude certain land (Unit 1) from the critical habitat designation. J.A. 95–98, 189–90.

Petitioner and its supporters seek to overstep the bounds of the second question presented on the reviewability of decisions not to exclude areas from critical habitat designations, and they tack on the additional request that this Court comment on the merits of FWS's decision not to exclude Unit 1 from designation as critical habitat. *E.g.*, Pet'r Br. 56 ("This Court may itself decide that FWS's determination was an abuse of discretion."); Wash. Legal Found. & Allied Educ. Found. *Amici* Br. 30. ("Given the factual record, the Court may wish to consider declaring that FWS abused its discretion."); *see also* Alabama et al. *Amici* Br. 3.

Embedded in their request for the Court's comment is the flawed assumption that neither ancillary benefits nor unquantified benefits deserve any weight when comparing the costs and benefits of critical habitat designations. *E.g.*, Markle Interests et al. Br. 15 ("The Service's economic analysis found only ancillary benefits."); *id.* 50 ("[T]he conservation benefit to the frog amounts to nil."); Wash. Legal Found. Br. 33 ("[T]he study confined its discussion to consideration of 'ancillary benefits'. . . . [T]he relevant

'benefits' of FWS's designation are precisely zero."). Those attempts to belittle and ignore ancillary and unquantified benefits contravene the plain text of the Endangered Species Act and violate both guiding principles and longstanding agency practices for rational, balanced economic analysis.

The 1978 amendments to the Endangered Species Act authorized the agency to consider a broad scope of "benefits," consistent with Executive Orders and guidance from the Office of Management and Budget on regulatory impact analysis. For at least twenty-five years, under administrations of both political parties, FWS has consistently assessed the ancillary and unquantified benefits of critical habitat designations. Courts have repeatedly required agencies to account for the indirect and unquantified consequences of regulation, and courts unmistakably allow the consideration of ancillary and unquantified benefits when not expressly precluded by statute.

Should this Court reach the merits of how FWS weighed the costs and benefits of its critical habitat designation, the Court should recognize that it is appropriate for agencies to fully consider ancillary and unquantified benefits—indeed, had FWS failed to consider important ancillary or unquantified benefits of its critical habitat designation, that omission would have been arbitrary.

ARGUMENT

I. FWS Considered Ancillary and Unquantified Benefits in the Critical Habitat Designation

The Endangered Species Act requires the agency to "tak[e] into consideration the economic impact . . .

and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The statute then gives the agency discretion to exclude certain areas from designation if "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.*

Following those statutory instructions, FWS considered both the direct and ancillary benefits of designating critical habitat for the dusky gopher frog (as well as the direct and indirect costs). In the *Federal Register* publication of the rule designating critical habitat for the frog, FWS explains that the "direct benefits . . . are best expressed in biological terms" that are difficult to "quantify or monetize." J.A. 189. FWS also more broadly referred to the "qualitative discussion" of all of the designation's "economic benefits" contained in the *Final Economic Analysis*. *Id.*; *see also* J.A. 190 (further concluding that "Our economic analysis did not identify any disproportionate costs" as compared to the total economic benefits of the designation).

The *Final Economic Analysis* explains that—under the best practices for assessing costs and benefits provided by Executive Order 12,866 and the Office of Management and Budget (OMB)'s *Circular A-4*—federal agencies consider both direct and ancillary benefits. Indus. Econ. Inc., *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog: Final* at 2-18 (2012) (prepared for FWS)

[hereinafter *FEA*].[3] The direct benefit of the critical habitat designation is "the potential to enhance conservation" of the dusky gopher frog, *id.*, and a valuation of the direct benefit would reflect "public willingness to pay for wildlife-viewing opportunities" and "to assure that the species will exist for future generations," as well as the frog's existence value, *id.* at 5-1. Unfortunately, the data necessary to quantify or monetize the direct benefits did not exist. *Id.*

The *Final Economic Analysis* then lists numerous ancillary benefits. While these ancillary benefits were not the primary motivation for the critical habitat designation, they are nevertheless important and exist independently of any conservation benefits accruing specifically to the dusky gopher frog. The ancillary benefits of the critical habitat designation arise through two pathways. First, the critical habitat designation protects certain environmental conditions and features, called "Primary Constituent Elements." *Id.* at 2-18. For example, the critical habitat designated as Unit 1 was selected to protect its "ephemeral wetland habitat." J.A. 153, 160–161, 167 (meaning isolated ponds, free of chemicals and sediment, with surface water lasting at least 195 days during breeding season). Maintaining those ephemeral wetlands "may generate other social benefits aside from the preservation of the [dusky gopher frog] species." *FEA*, *supra*, at 2-18. Second, the designation and subsequent conservation efforts may

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[3] Some pages of the *Final Economic Analysis* are omitted from the Joint Appendix. The full report is available at https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157.

preserve certain portions of undeveloped land in Unit 1. *Id.* at 5-2. The resulting open space preserved from development may generate ancillary benefits.

Overall, the important categories of potential ancillary benefits from the designation of critical habitat for the dusky gopher frog include:

- Property value benefits for adjacent or nearby landowners from increased open space or decreased density of development;
- Benefits to other coexisting species from the preservation of ephemeral wetlands and open spaces, including use and non-use values for those species;
- Improvements to ecosystem health, biodiversity gains, and ecosystem service benefits, including potential improvements in water quality;
- Aesthetic benefits and public willingness to pay to preserve wetland habitats or open spaces;
- Increased recreational opportunities throughout the region;
- Possible gains to regional employment, output, or income stemming from the above benefits; and
- Benefits to state and local governments, because identification of these critical habitats and the features they contain will assist local governments with long-range planning.

Id. at 2-18, 5-1 to 5-3; 77 Fed. Reg. 35,118, 35,144 (June 12, 2012).[4]

Petitioner and its supporters wrongly portray all these ancillary benefits as worthless.

II. Ancillary Benefits Must Be Given Due Consideration Under the Endangered Species Act, Executive Orders, and Best Practices for Cost-Benefit Analysis

A. Petitioner and Its Supporters Wrongly Disparage Ancillary Benefits

In attacking how FWS weighed the benefits of including Unit 1 in the critical habitat designation, Petitioner ignores the designation's many ancillary benefits. First, Petitioner accuses FWS of "invo[king]" the direct "'biological' benefits" of "the designation *as a whole*" to justify specifying Unit 1 as critical habitat, rather than focusing on "area-specific" benefits particular to Unit 1. Pet'r Br. 53. In fact, *all* the ancillary benefits listed in the *Final Economic Analysis* "are only anticipated related to the avoidance of development in Unit 1." *FEA*, *supra*, at 5-2.[5] Because FWS considered both direct and

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[4] Several pages from the *Federal Register* publication of the critical habitat designation, including sections on compliance with requirements for various regulatory analyses, are omitted from the Joint Appendix.

[5] The other units designated as critical habitat mostly either are already "managed to benefit the gopher frog," already have development plans that "include leaving proposed critical habitat areas as wetlands/open space," or are areas where "large-scale development . . . appears unlikely." *FEA*, *supra*, at ES-7, 2-14, 3-1 to 3-3, 4-11. Therefore, the "incremental[ ]" and "additional" conservation efforts "anticipated . . . as a result of

ancillary benefits in deciding not to exclude Unit 1, and because all the potential ancillary benefits will accrue from Unit 1's designation, FWS made an area-specific determination for Unit 1's inclusion. Petitioner's argument ignores the existence of the ancillary benefits from Unit 1.

Second, Petitioner argues that the *Final Economic Analysis* offers a "deficient" explanation of how FWS weighed costs and benefits, and Petitioner mischaracterizes the economic analysis as "briefly discuss[ing] a handful of 'weak[ ] and speculative' economic benefits (on which FWS did not rely)." Pet'r Br. 54 n.15. In fact, the *Final Economic Analysis*'s Chapter 5 on "Potential Economic Benefits" lists four categories of direct use and non-use values; explains the data challenges that prevented quantifying or monetizing those direct benefits; and qualitatively describes multiple important ancillary benefits, including property value benefits, aesthetic benefits, recreation benefits, ecosystem service benefits such as water quality, biodiversity and habitat maintenance benefits, and use and non-use values for preserving co-existing species. *FEA*, *supra*, at 5-1 to 5-3; *see also id.* at 2-18. In the *Federal Register* publication of the rule, when FWS discusses its qualitative consideration of "economic benefits," J.A. 189, it is referring to the entire suite of both direct and ancillary benefits examined in Chapter 5 of the economic analysis, and the agency explicitly relies on all those benefits in concluding that the costs of designation were not "disproportionate." J.A. 190 (the

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critical habitat designation" will occur in Unit 1, and so Unit 1's designation generates the ancillary benefits. *Id.* at 5-2.

paragraph concluding that costs were not disproportionate immediately follows the paragraph referencing the FEA's discussion of economic benefits). Again, Petitioner's argument ignores the relevance of ancillary benefits.

Third, Petitioner argues that all possible benefits are "speculative" because no "biological benefit" can occur in Unit 1 without both voluntary translocation of the dusky gopher frog and voluntary management of the site as frog habitat, and Unit 1's landowners allegedly have not agreed to undertake such actions. Pet'r Br. 54–55. Yet again, Petitioner is ignoring the important categories of ancillary benefits, many of which can occur independently of frog translocation or management of the site as frog habitat. Regardless of frog translocation or habitat management, the preservation of ephemeral wetlands and open spaces in Unit 1 may raise adjacent property values, benefit other coexisting species, improve ecosystem services like water quality, preserve aesthetic benefits, and increase recreational opportunities throughout the region. J.A. 97–98. Additionally, the designation itself produces useful environmental information that may assist local governments with their long-term planning. 77 Fed. Reg. at 35,144.

Landowner Respondents even more explicitly disparage ancillary benefits as inferior: when their brief incorrectly alleges that "[t]he Service's economic analysis found only ancillary benefits," Markle Br. 15, the word "only" reads as an attempt to trivialize. Landowner Respondents then conspicuously omit any reference to ancillary benefits when dismissing "the

conservation benefit to the frog" as "amount[ing] to nil." *Id.* at 50.

Amici Washington Legal Foundation also attempt to trivialize ancillary benefits. After wrongly concluding that the *Final Economic Analysis* "could not identify *any* 'direct benefits,'" Wash. Legal Found. Br. 32—in fact, the analysis identified several direct use and non-use values, though it could not quantify them, *FEA*, *supra*, at 5-1—the amici mischaracterize the economic analysis as "confin[ing] its discussion to consideration of 'ancillary benefits,'" Wash. Legal Found. Br. 33. Amici then dismiss all those ancillary benefits as unconnected to "the purpose of designating critical habitat designation: to ensure the survival of an endangered species." *Id.* Consequently, amici conclude that "the relevant 'benefits' of FWS's designation are precisely zero." *Id.* In other words, amici deem ancillary benefits to be worthless and irrelevant to the purpose of the Endangered Species Act. *See also* Alabama et al. *Amici* Br. 3 (failing to mention ancillary benefits in their critique of FWS's consideration of benefits); Am. Farm Bureau Fed'n et al. *Amici* Br. 35 (same).

Contrary to amici's argument, ancillary benefits are highly relevant to decision made under the Endangered Species Act, as explained in the next section of this brief. By ignoring important categories of ancillary benefits, Petitioner and its supporters contravene the plain text and congressional intent of the Endangered Species Act.

B. The Endangered Species Act Requires Consideration of All Benefits—Direct and Ancillary

Section 4(b)(2) of the Endangered Species Act—which grants discretion to exclude areas from critical habitat designations if "the benefits of such exclusion outweigh the benefits of specifying such area"—places no limiting qualifiers on the term "benefits." 16 U.S.C. § 1533(b)(2). Congress knew how to limit the consideration of benefits to only those benefits accruing specifically to the endangered species. For example, Congress instructs the agency not to designate any Department of Defense lands as critical habitat if those lands are already "subject to an integrated natural resources management plan" that the agency determines already adequately "provides a benefit *to the species* for which critical habitat is proposed for designation." 16 U.S.C. § 1533(a)(3)(B)(i) (emphasis added). By comparison, Section 4(b)(2)'s open-ended use of the word "benefits" indicates that all benefits count, whether direct benefits to a particular endangered species or ancillary benefits to other species, habitats, and interests. Indeed, the word harkens back to the congressional finding and declaration that introduces the Endangered Species Act: "the Nation's heritage in fish, wildlife, and plants" is "for the *benefit of all* citizens." 16 U.S.C. § 1531(a)(5) (emphasis added). Consequently, it was reasonable for FWS to interpret the undefined term "benefits" broadly to include all direct and ancillary benefits.

The legislative history from the 1978 statutory amendments that added Section 4(b)(2) confirms the

broad scope of the word "benefits." The language for Section 4(b)(2) originated in a bill drafted by the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, chaired by Rep. Leggett. During the House's consideration and passage of the legislation, in the middle of discussing the "discretion" now given to the Secretary in weighing the costs and benefits of critical habitat designation, Rep. Leggett recalled that:

> The ultimate goal of the Endangered Species Act is the conservation of the ecosystem on which all species, whether endangered or not, depend for survival.

124 Cong. Rec. 38,134 (Oct. 14, 1978) (statement of Rep. Leggett), *reprinted in* S. Comm. on Env't & Pub. Works, 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979 and 1980*, at 825 (1982) [hereinafter Leg. Hist.]. In other words, the chair of the drafting committee believed that ancillary benefits to non-endangered species, and to the ecosystems they share with endangered species, were relevant to critical habitat designations.

A related provision introduced in the 1978 amendments required an interagency Endangered Species Committee to exempt certain federal actions from consultations and restrictions if "the benefits of such action clearly outweigh the benefits of alternative courses of action." 16 U.S.C. § 1536(h)(1)(A)(ii). A Joint Explanatory Statement of the House-Senate Conference Committee on the 1978 amendments explained that the word "benefits" in

that related provision "shall include, but not be limited to, ecological and economic considerations," and that the interagency committee "should also consider the national interest . . . the esthetic, ecological, educational, historical, recreational and scientific value of any endangered or threatened species; and any other factors deemed relevant." H.R. Rep. No. 95-1804 (1978), *reprinted in* Leg. Hist., *supra*, at 1211.

In addition to that expansive and open-ended list, the Joint Explanatory Statement of the House-Senate Conference Committee also recommended that the interagency Endangered Species Committee should consult the criteria "in OMB Circular A-107 and in Executive Order 11,949" on the scope of costs and benefits to consider. *Id.* President Ford issued Executive Order 11,949 to broaden the title and scope of his prior Executive Order 11,821, from "inflation impact statements" to the broader "economic impact statements." 42 Fed. Reg. 1017 (Jan. 5, 1977). OMB's *Circular A-107*, issued in 1975 under Executive Order 11,821, guided agencies on their evaluation of regulatory impacts, and notably it both encouraged agencies to consider "secondary cost and price effects" and also recognized that not all important benefits could be quantified. Office of Mgmt. & Budget, Exec. Office of the President, *Circular A-107* § 4(b)(1)–(2) (1975) (advising that "benefits should be quantified to the extent practical" and so implicitly including unquantifiable effects in the "comparison of the benefits").[6] It is notable that, from the time of the 1978

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[6] *Available at* https://www.fordlibrarymuseum.gov/library/document/0039/18514794.pdf (see page 34 of the pdf).

amendments, Congress intended that the term "benefits" be understood by reference to the federal government's guiding documents on regulatory cost-benefit analysis, which advised agencies to consider indirect effects and unquantified benefits. Of course, those original documents referenced by Congress—*Circular A-107* and Executive Order 11,949—were the precursors to the federal government's current guiding documents on cost-benefit analysis: *Circular A-4* and Executive Orders 12,866 and 13,563.[7] As explained in the next section, those current guidelines continue to require federal agencies to fully consider both ancillary and unquantified benefits.

C. Executive Orders and Guidelines Require Federal Agencies to Consider Ancillary Benefits in Regulatory Impact Analyses

To accurately evaluate costs and benefits in regulatory impact analyses, executive orders require federal agencies to consider not only direct effects, but also all important indirect benefits (sometimes called ancillary benefits or co-benefits) as well as indirect costs (sometimes called countervailing risks). Executive Order 12,866 instructs agencies to "assess *all* costs and benefits," including "both quantifiable . . . and qualitative measures," where benefits include

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[7] Executive Order 12,866 remains the guiding order on regulatory cost-benefit analysis under the Trump administration, and recent executive orders have continued to cite elements of Executive Order 13,563 as well. *See* Exec. Order No. 13,777 § 2(a)(ii)-(iii), 82 Fed. Reg. 12,285, 12,285 (Mar. 1, 2017). Regardless, Executive Orders 12,866 and 13,563 were the operative orders in 2012, when FWS finalized its critical habitat designation rule for the dusky gopher frog.

any "other advantages" relevant to the determination and consistent with statutory requirements. Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993) (emphasis added). Executive Order 13,563 affirms those instructions and elaborates that agencies must accurately measure the "actual results of regulatory requirements." Exec. Order No. 13,563 § 1, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011). The orders make no distinction between the treatment of direct and indirect effects.

The Office of Management and Budget under President George W. Bush issued *Circular A-4*, to "standardiz[e] the way benefits and costs of Federal regulatory actions are measured." Office of Mgmt. & Budget, Exec. Office of the President, *Circular A-4* at 1 (2003) [hereinafter *Circular A-4*]. The *Circular* instructs agencies to consider "any important ancillary benefits" (defined as any "favorable impact . . . secondary to the statutory purpose of the rulemaking"), and stresses that "[t]he same standards of information and analysis quality that apply to direct benefits and costs should be applied to ancillary benefits and countervailing risks." *Id.* at 26.

The Environmental Protection Agency (EPA) has also developed its own *Guidelines for Preparing Economic Analyses*, to "establish a sound scientific framework for performing economic analyses of environmental regulations and policies." Envtl. Prot. Agency, *What Are the* Guidelines?, https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses (last visited July 1, 2018). These guidelines, which were substantially updated in 2010 after extensive peer

review, stress the importance of assessing "all identifiable costs and benefits," including both direct effects "as well as ancillary [indirect] benefits and costs." Envtl. Prot. Agency, *Guidelines for Preparing Economic Analyses* 11-2 (2010).[8] Though not binding on other agencies, EPA's *Guidelines* reflect deep and careful thinking about environmental economics and provide a useful synthesis of best analytical practices that other agencies can follow. *See FEA*, *supra*, at 2-4 n.33 (citing the *Guidelines*).

Indeed, EPA has a long history of considering ancillary benefits in regulatory decisions made under administrations of both political parties. For example, under President Ford in 1975, EPA considered the "indirect benefits from induced mass transit improvements" in proposing a new transportation control plan for metropolitan Boston to regulate automobile emissions. 40 Fed. Reg. 8668, 8673 (Feb. 28, 1975). Under President Carter, EPA's cost-benefit analysis of warning labels for hazardous chemicals considered the "indirect benefits of the labeling regulation," including the "incentives for the development of safer substitutes." 46 Fed. Reg. 3471, 3472 (Jan. 14, 1981). And under President Reagan, EPA explained that it intended to "consider the full spectrum of the potential impacts of regulation," including "indirect benefits accruing from concomitant reductions in other regulated pollutants." 52 Fed. Reg. 25,399, 25,406 (July 7, 1987).

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[8] *Available at* https://www.epa.gov/sites/production/files/2017-09/documents/ee-0568-11.pdf.

As discussed in the next section, agencies have long considered the ancillary benefits of critical habitat designations, stretching from at least 1992 through to the current presidential administration.

D. For Over Twenty-Five Years, Under Administrations of Both Parties, FWS Has Consistently Assessed the Ancillary Benefits of Critical Habitat Designations

FWS has a long history, under administrations of both political parties, of assessing ancillary benefits in its critical habitat designations. For example, in 1992 during the George H.W. Bush administration, FWS issued its Determination of Critical Habitat for the Northern Spotted Owl. In that designation, FWS wrote:

> Designation of critical habitat for the spotted owl is expected to provide a wide range of economic benefits to society. These economic benefits are whenever possible defined in monetary terms. They include use values as well as intrinsic or preservation values. Benefits provided by preservation of the owl's habitat include the same types of direct *and indirect use values* of old growth forest ecosystems. Habitat preservation also provides *water quality protection, scenic and air quality, biological diversity, and other environmental services.*
>
> Benefits of critical habitat designation are in addition to those

> provided by listing of the owl as threatened or those derived from other actions taken by land management agencies to provide protection to the owl and its habitat. Only the incremental protection provided by critical habitat designation, *and the ancillary benefits* attributable to that action, are compared with the incremental costs of restricting timber harvest and other economic effects of designating critical habitat.

57 Fed. Reg. 1796, 1819 (Jan. 15, 1992) (emphases added).

Throughout the administrations of Presidents Bill Clinton and George W. Bush, FWS's economic analyses routinely discussed ancillary benefits. For example, in the 2006 analysis of the critical habitat designation for the mountain yellow-legged frog, FWS listed such "ancillary benefits" as adjacent property value increases, "increased water quality resulting from fewer recreators impacting streams (e.g., reduced siltation), improved biological information resulting from surveys of frog habitat, and reduced threat of catastrophic fire related to increased fire suppression activities." Indus. Econ. Inc., *Economic Analysis of Critical Habitat Designation for the Mountain Yellow-Legged Frog* 9 (2006) (prepared for FWS);[9] *see also, e.g.*, Indus. Econ. Inc., *Economic Analysis of Critical Habitat Designation for the*

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[9] *Available at* https://www.fws.gov/economics/Critical%20Habitat/Final%20Reports/Mountain%20yellow-legged%20frog/MYLF_FEA1_2006.08.14.pdf.

Guajón 9–10 (2007) (prepared for FWS) ("For example, conservation of guajón habitat may reduce erosion in stream watersheds, improving water quality in downstream reservoirs.");[10] Indus. Econ. Inc., *Economic Analysis of Critical Habitat Designation for the Alameda Whipsnake* 18 (2000) (prepared for FWS) (listing such benefits as biodiversity, ecosystem health, and wildlife viewing).[11]

More recently, in its August 2017 designation of critical habitat for certain populations of endangered and threatened Atlantic sturgeon, the National Marine Fisheries Service—FWS's partner agency in administering the Endangered Species Act—wrote:

> Other benefits of designation include ancillary benefits to other commercially-important aquatic species associated with Atlantic sturgeon habitat; non-use values for sturgeon and their habitats; and increased state, local and public awareness of the importance of these areas, that could generate non-federal conservation efforts and benefits.

82 Fed. Reg. 39,160, 39,234 (Aug. 17, 2017). Though in that rulemaking the National Marine Fisheries Service ultimately excluded certain areas from

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[10] *Available at* https://www.fws.gov/economics/Critical%20Habitat/Final%20Draft%20Reports/Guajon/Guajon_FinalDEA_5.29.07.pdf.

[11] *Available at* https://www.fws.gov/economics/Critical%20Habitat/ESA%20Reports%20as%20of%20August%202005/Alameda%20whipsnake/Final%20Report/SNAKEFN4.DOC.

habitat designation, it did so only after considering all the important ancillary benefits. *Id.*

FWS's reliance on ancillary benefits in its critical habitat designation for the dusky gopher frog is consistent with this twenty-five-year-long practice under the Endangered Species Act. Moreover, its consideration of ancillary benefits is consistent with the agency's consideration of indirect costs, as explained in the next section.

E. It Would Be Arbitrary to Treat Ancillary Benefits Differently Than Indirect Costs

Even as they dismiss ancillary benefits as worthless, Petitioner and its supporters criticize FWS's alleged failure to consider all indirect costs, such as lost tax revenue to the local government and secondary hazards arising from any controlled burns set to manage the frog habitat. Pet'r Br. 54; Wash. Legal Found. Br. 31.[12] There are two fatal problems with this argument.

First, the agency already accounted for indirect effects like taxes and fires. FWS's economic analysis detailed both the direct and indirect costs of the

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[12] Lost tax revenue, assuming it existed, would not properly be characterized as a "cost"; rather, it would be a distributional effect, since taxes are transfer payments from private parties to the government. *See Circular A-4*, *supra*, at 14 ("[T]he revenue collected through a . . . tax is a transfer payment."). Potential environmental or health hazards resulting from controlled burns, assuming they existed, would clearly be indirect costs, as they are highly analogous to the prototypical example of countervailing risks offered by OMB's *Circular A-4*: namely, "adverse safety impacts from more stringent fuel-economy standards," *see id.* at 26.

critical habitat designation. The agency explained that costs were uncertain and so considered a range of scenarios, under which the monetized direct costs for Unit 1's designation could be as little as $0, or as much as $34 million. *FEA*, *supra*, at ES-9. Then FWS also qualitatively considered a variety of indirect costs, including costs from regulatory uncertainty, stigma costs to property values, and lost oil and gas production. *Id.* at 2-17, 4-8. Finally, the agency considered, but ultimately dismissed as unlikely, both possible indirect lost tax revenue for the local government, 77 Fed. Reg. at 35,127, and possible indirect health or environmental effects from the controlled burns necessary to manage habitat for the dusky gopher frog, *id.* at 35,126.

Second, there is no reason for agencies to treat indirect benefits differently than indirect costs. Indeed, it is hard to imagine anything more arbitrary or capricious than taking indirect consequences of regulation into account if they are negative while ignoring them if they are positive.

Indirect benefits "are simply mirror images" of indirect costs. Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. Chi. L. Rev. 1763, 1793 (2002). The terms "benefit" and "cost" are merely convenient labels for positive effects versus negative effects and do not reflect any distinction warranting different analytical treatment. For example, EPA's original analysis of its greenhouse gas standards for passenger cars counted consumers' fuel savings "as negative costs (i.e., positive benefits)." Envtl. Prot. Agency, *Draft*

Regulatory Impact Analysis: Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards at xiii (2009). Furthermore, agencies are required to treat costs and benefits alike and consider each with comparable analysis, and may not "put a thumb on the scale by undervaluing the benefits and overvaluing the costs." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008); *see also Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (chastising the agency for "inconsistently and opportunistically fram[ing] the costs and benefits of the rule"); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding that if an agency "trumpet[s]" economic benefits, it must also disclose costs); *Mont. Envtl. Info. Ctr. v. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017) (finding it "arbitrary and capricious" to "quantify socioeconomic benefits while failing to quantify costs").

According to two former administrators of the Office of Information and Regulatory Affairs, the office charged with reviewing agencies' cost-benefit analyses, there are "no legal, political, or intellectual . . . impediments to treating ancillary benefits and countervailing risks equally in cost-benefit analysis." Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 Mich. L. Rev. 877, 888 (2010). Given the lack of a logical distinction between indirect costs and indirect benefits, Petitioner and its supporters cannot reasonably contend that FWS must consider those indirect costs that support their arguments, while also insisting that indirect benefits

are irrelevant and worthless. Such an illogical distinction would be arbitrary and capricious, and would violate legal precedents on the consideration of indirect regulatory effects, as described further in the next section of this brief.

F. Courts Require Agencies to Account for the Indirect Consequences of Regulation

At a minimum, consideration of ancillary benefits is permissible when not expressly precluded by statute. *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 625–26 (D.C. Cir. 2016) (explaining that the statutory "text does not foreclose the Agency from considering co-benefits and doing so is consistent with the [statute's] purpose"). Since the Endangered Species Act does not expressly preclude the consideration of ancillary benefits—to the contrary, the plain text, legislative history, and statutory purpose require it, *see supra* Section II.B.—FWS had discretion to weigh ancillary benefits against economic costs in deciding whether to exclude areas from critical habitat designations.

Moreover, when agencies choose or are required to justify rules by a cost-benefit analysis, courts have repeatedly instructed agencies to consider indirect effects. In the recent case *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015), this Court explained that the advantages and disadvantages of regulation included not just direct compliance costs, but indirect "harms that regulation might do to human health or the environment." Numerous rulings from several U.S. Courts of Appeals similarly require agencies to account for the indirect effects of regulation when

weighing costs and benefits. *See Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1051–52 (D.C. Cir. 1999) (holding that EPA must consider the indirect health costs of reducing a pollutant rather than only "half of a substance's health effects"), *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 956 F.2d 321, 326–27 (D.C. Cir. 1992) (striking down a rule for failing to consider indirect safety effects); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1224–1225 (5th Cir. 1991) (holding that EPA must consider the indirect safety effects of substitute options for car brakes when banning asbestos-based brakes under the Toxic Substances Control Act); *see also Am. Dental Ass'n v. Martin*, 984 F.2d 823, 826 (7th Cir. 1993) (criticizing the Occupational Safety and Health Administration because its "consideration of the indirect costs of the rule is thus incomplete").

Although those precedents focus on the consideration of indirect costs rather than indirect benefits, as explained above, there is no logical reason for agencies to treat indirect benefits differently than indirect costs.

III. Unquantified Benefits Also Must Be Given Due Consideration Under Executive Orders and Best Practices for Cost-Benefit Analysis

Neither the ancillary nor the direct benefits of the critical habitat designation for the dusky gopher frog should be ignored simply because they cannot currently be fully quantified or monetized.

To the contrary, the executive orders governing regulatory analysis instruct agencies to give due consideration to all important unquantified costs and benefits. Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. at 51,735 ("Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."); *see also* Exec. Order No. 13,563 § 1, 76 Fed. Reg. at 3821. OMB's *Circular A-4* cautions agencies against ignoring the potential magnitude of unquantified benefits, because the most efficient rule may not have the "largest quantified and monetized . . . estimate." *Circular A-4, supra*, at 2. Indeed, it is widely recognized in the economic literature that cost-benefit analysis requires proper consideration of effects that "defy quantification but are thought to be important." Kenneth J. Arrow et al., *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles* 8 (1996).[13] The mere fact that a benefit cannot currently be quantified says little about its magnitude. In fact, some of the most substantial categories of monetized benefits that appear in current regulatory impact analyses were once considered unquantifiable. *See* Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 Cal. L. Rev. 1423, 1436 (2014) (explaining, for example, how the key valuation of mortality risk

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[13] *Available at* http://www.aei.org/wp-content/uploads/2014/04/-benefitcost-analysis-in-environmental-health-and-safety-regulation_161535983778.pdf.

reductions—also known as the "value of statistical life"—had "initially evaded quantification").

Proper consideration of unquantified benefits has long been part of best agency practice. Recall how in 1978, Congress referred the interagency Endangered Species Committee to OMB's *Circular A-107*, which advised agencies that "benefits should be quantified to the extent practical" but implicitly recognized that some important benefits could not be quantified. *See supra* Section II.B. FWS has a long history, stretching back over twenty-five years and through administrations of both political parties, of following that advice and weighing unquantified benefits in its critical habitat designations. For example, in 1992, FWS explained that "economic benefits are whenever possible defined in monetary terms" but proceeded to discuss numerous benefits in qualitative terms, including biodiversity and ecosystem services. 57 Fed. Reg. at 1819; *see also, e.g.*, Indus. Econ. Inc., *Economic Analysis of Critical Habitat Designation for the Mountain Yellow-Legged Frog*, *supra*, at 9 (2006) ("Data required to quantify and monetize these benefits (e.g., incremental changes in water quality . . .) are not readily available.").

Agencies have long weighed unquantified environmental benefits in a variety of contexts. For example, in response to criticisms of its benzene regulations under the Clean Air Act, EPA under President George H.W. Bush "reject[ed] the position that only quantified information can be considered in the decisions." 55 Fed. Reg. 8292, 8302 (Mar. 7, 1990). Similarly, in EPA's *Guidelines on Preparing Economic Analyses*, the agency writes: "In reality . . . there are

often effects that cannot be monetized, and the analysis needs to communicate the full richness of benefit and cost information beyond what can be put in dollar terms. . . . Benefits and costs that cannot be quantified should be presented qualitatively." *Guidelines*, *supra*, at 11-2.

Courts agree that agencies have an obligation to consider reasonably foreseeable but difficult to quantify regulatory effects. *See, e.g.*, *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) ("The mere fact that the magnitude of [an effect] is uncertain is no justification for disregarding the effect entirely."); *Am Trucking Ass'ns v. EPA*, 175 F.3d at 1052 (rejecting the idea that EPA could ignore health effects that are "difficult, if not impossible, to quantify reliably").

The fact that the data necessary to quantify and monetize the direct and ancillary benefits of the critical habitat designation did not exist in no way diminishes the relevance of these benefits to FWS's decision. Agencies are expected to weigh unquantified effects against monetized costs and benefits in accordance with their judgment and expertise. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 235 (2009) (Breyer, J., concurring in part and dissenting in part) (writing approvingly of EPA's ability to "describe environmental benefits in non-monetized terms and to evaluate both costs and benefits in accordance with its expert judgment and scientific knowledge"). That is precisely what FWS did here.

CONCLUSION

Should this Court enlarge the scope of the second question presented as Petitioner and its supporters seek and so reach the merits of how FWS weighed the costs and benefits of its critical habitat designation, the Court should recognize that it is appropriate for agencies to fully consider ancillary and unquantified benefits.

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No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE LANDOWNERS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are landowners who value the presence of endangered species on their property and who welcome efforts to preserve the species' habitats. Amici file this brief to correct Weyerhaeuser's one-sided description of the effect of the Endangered Species Act on property owners.

SUMMARY OF ARGUMENT

Weyerhaeuser and its amici depict the Endangered Species Act as if it merely imposed burdens on landowners. In fact, the protection of endangered species also confers *benefits* on many landowners. The ability to live among rare forms of wildlife is of substantial value, in both an economic and a non-economic sense, to a great many people. Some landowners buy property specifically because it is the habitat of endangered species, and many more welcome efforts to protect endangered species found on their land. The presence of endangered species can be a valuable amenity associated with real property, like a view of the ocean or proximity to a park.

This brief will show the value of endangered species to landowners in two ways.

First, the brief will tell amici's own stories. Amici are landowners who are committed to protecting the endangered species on their property. Some have commercial reasons, while others simply enjoy the recreational opportunities afforded by living among

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution intended to fund the preparation or submission of this brief. The parties have all filed blanket consents to amicus briefs.

rare animals. For these landowners, the Endangered Species Act is a benefit, not a burden.

Second, the brief will show that amici are hardly unusual in valuing the protection of endangered species. Studies have repeatedly shown that proximity to environmental amenities raises the value of real property. In today's world, the presence of endangered species is an increasingly valuable amenity. Just as people will pay to live close to the water or to greenspace, they will pay to live close to wildlife.

In determining whether the Fish and Wildlife Service's interpretation of the statute is reasonable, therefore, a court cannot simply look to the losses suffered by the particular landowner who happens to be litigating. The court also has to consider the benefits FWS's interpretation confers upon countless other landowners who have no reason to litigate.

ARGUMENT

Many landowners welcome efforts to preserve the habitats of endangered species on their property, because they place great value on living among rare forms of wildlife.

A. Amici have cooperated with the Fish and Wildlife Service to protect endangered species on their land, for both recreational and commercial reasons.

Amici live in many different places and pursue many different callings, but they have one thing in common. They are all landowners for whom the protection of endangered species on their property is a gain, not a loss. Some have commercial reasons for

supporting the government's efforts to preserve the species' habitats. Others simply enjoy viewing rare forms of wildlife on their property.

Here are their stories.

Ann Prezyna owns 120 acres in Cochise County, in southeast Arizona. She purchased the property specifically because it is home to a wide variety of wildlife and native plants, including rare and endangered species such as the yellow-billed cuckoos she enjoys watching nest in her front yard. Prezyna placed a 100% conservation easement on most of the property, and has spent considerable money and effort improving its value as habitat. "Observing wildlife going about their lives from my front porch makes me very happy, and is a simple pleasure I share with countless friends," she notes.

Lance Kyle has a 99-year lease on property in Kendall County, Texas, outside of San Antonio. He runs an eco-tourism business. Having endangered species on the land is good for business, because it helps attract customers interested in learning about the natural world.

Nancy Warren owns 281 acres in Ontonagon County, in the Upper Peninsula of Michigan. Her property is the habitat of several rare animal species, including wolves and eagles. She explains: "Having endangered and threatened species using our property has enhanced our enjoyment of our property. We enjoy finding wolf tracks and hearing them howl while standing in our yard and capturing their picture on our trail camera. We often see eagles soaring overhead and find wood turtles along the river bank." Warren describes her property as "a ca-

cophony of chirps, cackles, wails and honks, from spring peepers, toads, trumpeter swans, bitterns, geese, ducks, warblers, redwing blackbirds, tree swallows, hawks, and kestrels. Our wetlands have become a place for us to find solitude and enjoy nature."

Susan Sorrells owns property in Inyo County, California. She is using her land to create a habitat for the reintroduction of the Amargosa vole, a nearly extinct species of rodent. Several years ago she successfully did the same for the Shoshone pupfish. "We're recreating a habitat that has nourished all of these creatures for hundreds of years," Sorrells observes. "It's creating a great ecotourism opportunity for us. We have a good shot at really doing groundbreaking work on habitat restoration."

David Bugni owns 84 acres in Clackamas County, Oregon, not far from Portland. His property includes species of endangered or threatened fish, including coho salmon and winter steelhead. "As a matter of principle," he notes, "we value, appreciate, and enjoy biological diversity within our property in particular and worldwide in general. We have tried to instill this philosophy in our two children as well." The land is used for logging, and state law forbids cutting timber too close to the streams inhabited by the fish, but Bugni does not consider this an onerous restriction. "In fact, in our management plan for our forestland, we require even more stringent streamside buffers than those mandated by the State of Oregon."

Peter Tallman and his wife own property near the San Francisco River in Catron County, New Mexico. Several endangered species live on their land, in-

cluding yellow-billed cuckoos, which arrive every summer. They enjoy watching the cuckoos from their front porch. The Tallmans rent out their guest house to vacationers, and they advertise the quality of bird life as a feature of the property.

Robert Ukeiley owns 290 acres in Baca County, in the southeastern corner of Colorado. The land is short grass prairie, part of a larger network of short grass prairie preserves. He explains: "My main, and really only motivation, for obtaining, keeping, and managing my land is to allow a native short grass prairie system to thrive, including the native plants and animals which belong in the short grass prairie." Ukeiley manages his land to provide a viable habitat for the black-footed ferret, an endangered species once thought to be extinct.

Elissa Wagner owns property in Santa Cruz County, California, that is part of the migratory path of the Santa Cruz long-toed salamander. The presence of the salamander "was a definite plus in our decision to buy this home and property." Her house is built on pilings to allow the salamander to traverse the property. "I love doing my best to be a steward of the earth," she says. The salamander is "a great emblem for thinking about our necessary connection to nature and the reciprocity of biodiversity—that in sustaining it, we sustain ourselves."

Carol and Paul Sills own property in Door County, Wisconsin, near Lake Michigan. They have asked to have their wetlands designated as critical habitat for the Hine's emerald dragonfly, because "we've admired the swarming activity of the dragonfly near our land."

Paul and Elizabeth Duncan own a 7-acre tract in Williamson County, Texas. When they bought the property in 1996, they knew that is the habitat of two endangered species of birds, the golden-cheeked warbler and the black-capped vireo. "We were aware of the ramifications and restrictions of the listing before we purchased the property," they recall, "and the listing did not deter our desire to own the property." Another species, the Georgetown salamander, was found in their property and listed by FWS as a threatened species in 2014. The Duncans have supported efforts to protect all three species, and they intend to continue doing so.

Gordon Pratt owns 75 acres in Riverside County, California, near the Beauty Mountain Wilderness Area. He purchased the land specifically to protect the Quino checkerspot, an endangered species of butterfly, and several other rare insect species. He grows many of the plants that the Quino checkerspot eats. "The advantage of owning the property is that I can do things to help butterflies by improving habitat," he says. "These projects on public lands require that I get permits and whatnot which make doing these projects often very difficult." Pratt enjoys learning about the relationship between animals and plants and their environment. "I hate to see any species get lost due to human effects upon the environment, since each species plays its own role in nature," he observes. "When I had enough money to purchase land for animal preservation I began doing such."

Ginger and Allan Heydman own property in Hays County, Texas, between Austin and San Antonio. Their land includes habitat for the golden-cheeked

warbler. When they bought the property, they recall, "the only consideration we had was to move to an untouched area we could preserve and interact with." They enjoy seeing the warblers on their land. The Heydmans have deliberately not cut down any of their larger trees, to preserve the birds' nesting sites. "We appreciate endangered species," they say, "because diversity is of paramount importance in preserving life as we know it on this planet."

Tom and Cathy Aley own property that is critical habitat, and indeed the only habitat, of the Tumbling Creek cavesnail, an endangered species that lives in a single cave in Taney County, Missouri. They have been trapping and removing an invasive crayfish that drove the cavesnail nearly to extinction. "Our snails are a community asset," Tom says. "Critical habitat has been a great help to us. We can prevent an extinction with what is in reality a very small amount of federal and state help."

Noah Greenwald and Amy Atwood bought their property in Deschutes County, Oregon, in part because it is critical habitat for the Oregon spotted frog. The habitat attracts other wildlife, including songbirds and deer. "Viewing and enjoying wildlife is a cherished activity for our whole family," they explain. They earn income from the wildlife as well. They have a cabin on the property which they rent to guests who share their enjoyment of the spotted frog and other species. The habitat "is certainly a draw," they say. "In the future, we plan to have some on-site education materials for guests who stay at the cabin."

Karen LeMay and Bob Behrstock moved from the San Francisco Bay Area to rural southeastern Arizo-

na to live closer to nature. Over three hundred species of birds and butterflies have been recorded on their property, several of which are endangered or threatened. Behrstock is a biologist who has led birding tours for forty years. He also sells photographs of birds and insects. LeMay is the founding director of Pollinator Corridors Southwest, a nonprofit organization that supports native plant habitats and the insect, bat, and hummingbird species that pollinate these plants. "We appreciate having endangered species and their habitat on our property because we feel strongly about living in harmony with the natural world," she says. "We take seriously the responsibility of encouraging the well-being of wildlife."

Bruce Means owns 50 acres in the Apalachicola National Forest, near Tallahassee, Florida. His property is critical habitat for the frosted flatwood salamander.

Lori Andresen owns land in Superior National Forest, in northeastern Minnesota. There are gray wolves on her property.

Charles Laird owns property in Washington that is habitat for several threatened and endangered species. He has been restoring the forest on his land to enhance the habitat.

Francis Schabram owns a 750-acre ranch in Calaveras County, California. Her property is critical habitat for the California red-legged frog. "I am proud of that fact," she says, "and dealing with Fish and Wildlife has had only positive impact on the ranch."

Brian Brown owns a farm in Inyo County, California, near Death Valley. His property includes crit-

ical habitat for the southwestern willow flycatcher and is also nesting habitat for the Least Bell's vireo. (These are two species of birds.) He has willingly allowed the Fish and Wildlife Service to restore the habitats on his property.

John Carter owns property in Idaho that he uses as a preserve for gray wolves and grizzly bears.

Crystal McMahon owns land in Klamath County, Oregon, that she is restoring to support the recovery of the Lost River sucker and the shortnose sucker, two species of fish.

Peggy and James Alexander own property in Greenlee County, Arizona, in the southeastern part of the state. Their land is habitat for several endangered species, including the loach minnow and the southwestern willow flycatcher. "It makes me feel lucky to be part of giving them a safe place to be, to rear their young and survive," Peggy says. She uses no pesticides or fertilizers, in order to protect the habitat.

Elaine Evans is a bee researcher at the University of Minnesota who owns property in St. Paul that is habitat for the endangered rusty-patched bumblebee. "I have always managed my property to maximize habitat for bees," she says. "I have regularly seen the rusty-patched bumblebee foraging in my yard. I appreciate that I see some in my yard every year as many of my fellow bee researchers have never seen this species alive."

Eric Horvath owns property in Oregon that includes a half-mile of stream with coho salmon spawning habitat. He has been helping to restore the

stream by planting trees for shade and placing large logs in the stream to enhance the habitat.

Sandy Anderson owns and operates the Gray Hawk Nature Center in Cochise County, Arizona. Her property is habitat for the yellow-billed cuckoo and the Huachuca water umbel. "As a land owner," she explains, "I am thrilled when my property can support an endangered species."

B. Proximity to wildlife and other environmental amenities can increase the value of real property.

The fact that many landowners value the presence of endangered species would come as no surprise to anyone familiar with the literature on this topic. A very large body of research demonstrates what experienced house-buyers know intuitively: Proximity to environmental amenities can increase the value of residential property.

For example, all else equal, the closer a residential parcel is to a greenbelt or to a park, the more valuable the parcel will be. Margot Lutzenhiser and Noelwah R. Netusil, *The Effect of Open Spaces on a Home's Sale Price*, 19 Contemporary Economic Policy 291, 297 (2001); Arthur C. Nelson, *Using Land Markets to Evaluate Urban Containment Programs*, 52 Journal of the American Planning Association 156, 163 (1986); Mark R. Correll et al., *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, 54 Land Economics 207, 211 (1978); Thomas R. Hammer et al., *The Effect of a Large Urban Park on Real Estate Value*, 40 Journal of the American Institute of Planners 274, 277 (1974).

The same holds true for other environmental amenities. The better the view of the ocean, all else equal, the more valuable the property. Rob Fraser and Geoff Spencer, *The Value of an Ocean View: An Example of Hedonic Property Amenity Valuation*, 36 Australian Geographical Studies 94, 98 (1998). Land becomes more valuable, all else equal, the closer it is to a sports field, a golf course, or a beach. Parvin Mahmoudi et al., *Space Matters: The Importance of Amenity in Planning Metropolitan Growth*, 57 Australian Journal of Agricultural and Resource Economics 38, 53-54 (2012).

Proximity to wildlife likewise enhances the value of residential property. In the northeast, an average home located near a National Wildlife Refuge is approximately six percent more valuable than a comparable home elsewhere. Xiangping Liu et al., *Amenity Values of Proximity to National Wildlife Refuges: An Analysis of Urban Residential Property Values*, 94 Ecological Economics 37, 42 (2013). In Florida, the premium is above ten percent. *Id.* The most thorough study of this topic concludes that "[t]he total capitalized value for homeowners within 0.5 mi[les] of a refuge and within 8 mi[les] of an urban core is over $270 million, averaging $11 million per refuge." *Id.* *See also* Bradley C. Neumann et al., *Property Price Effects of a National Wildlife Refuge: Great Meadows National Wildlife Refuge in Massachusetts*, 26 Land Use Policy 1011, 1018 (2009) (finding that homes become more valuable the closer they are to a National Wildlife Refuge).

Many homeowners value proximity to wildlife and they are willing to pay for it. Amici are typical in this respect.

Amici are also typical in the value they place specifically on preserving endangered species. The economic value of saving endangered species obviously cannot be measured directly, because there is no market in endangered species. But it can be measured indirectly, by conducting surveys that ask large numbers of people how much they would be willing to pay to protect particular endangered species from extinction.

The results of these surveys indicate that people are willing to pay significant sums in aggregate to preserve endangered species. Leslie Richardson and John Loomis, *The Total Economic Value of Threatened, Endangered and Rare Species: An Updated Meta-Analysis*, 68 Ecological Economics 1535 (2009); John B. Loomis and Douglas S. White, *Economic Benefits of Rare and Endangered Species: Summary and Meta-Analysis*, 18 Ecological Economics 197 (1996). When the gains from protecting species are measured this way, they can easily exceed the lost commercial value of the affected land. *See, e.g.*, Timm Kroeger and Frank Casey, *Economic Impacts of Designating Critical Habitat Under the U.S. Endangered Species Act: Case Study of the Canada Lynx (Lynx Canadensis)*, 11 Human Dimensions of Wildlife 437 (2006).

Indeed, many landowners volunteer to protect endangered species on their property by participating in a variety of programs that encourage them to do so. Christian Langpap and Joe Kerkvliet, *Endangered Species Conservation on Private Land: Assessing the Effectiveness of Habitat Conservation Plans*, 64 Journal of Environmental Economics and Management 1 (2012); David S. Wilcove and Joon

Lee, *Using Economic and Regulatory Incentives to Restore Endangered Species: Lessons Learned from Three New Programs*, 18 Conservation Biology 639 (2004).

Some real estate developers recognize that the presence of endangered species can enhance the value of residential property. In fact, in this very case, one of the public comments in favor of designating the land at issue as critical habitat was filed by Tradition Properties, Inc., which is building a master-planned community in the area. Tradition is marketing the homes to residential buyers who enjoy experiencing the natural world. Approximately 10 acres of the Tradition property are within the critical habitat designated for the gopher frog. Tradition explained:

> One of the four founding principles of Tradition is our commitment to environmental stewardship. This stewardship principle was reflected in our early planning efforts and continues to be a guiding principle as we work to establish a viable, vibrant community. In 2000, the Sierra Club recognized this commitment by naming Tradition a "Smart Growth Success Story," awarded to only one project in each state. The honor cited Tradition as a new model for coastal development and one that frees residents from captivity to their automobiles.
>
> ... Tradition supported the designation of the gopher frog as an endangered species and provided financial assistance to the USFWS and the U.S. Forest Service ("USFS") to conduct a tracking study to understand the migration and habits of the Mississippi gopher frog. Addition-

> ally, Tradition voluntarily imposed a "temporary no-development zone" on a portion of its community abutting the USFS land during the USFWS studies. ...
>
> Between 25-35% of Tradition's property is dedicated to green-space, public parks, and public common space, and we are creating a series of interconnected hiking and biking trails and pedestrian pathways throughout the community to reduce the dependency on automobiles. Additionally, we have plans to craft an organic, working farm on approximately 25 acres that will serve as a regional asset for locally sourced, sustainable, healthy foods.
>
> In summary, Tradition is committed to continuing its demonstrated record of being a good neighbor and steward of the environment. We support the USFWS designation of critical habitat for the Mississippi gopher frog as proposed.

July 30, 2010, Public Comment of Tradition Properties, Inc. (AR 1650). This is the comment of a profit-maximizing corporation that recognizes that the presence of endangered species will enhance the value of its real property.

In short, assessing the effect on land values of protecting endangered species is not as simple as Weyerhaeuser appears to believe. Different landowners place the Endangered Species Act on different sides of the ledger. It is a loss for some, but it is a gain for others. Some landowners oppose the designation of critical habitat on their property, while others support it.

This diversity of views among landowners suggests that a court should be cautious in evaluating whether the Fish and Wildlife Service has interpreted the statute reasonably. Lawsuits over the Endangered Species Act are, by definition, filed only by aggrieved landowners. In the normal course, a court never hears from all the landowners who favor the designation of their land as critical habitat, because these landowners have no reason to sue the government.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fifth Circuit should be affirmed.

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No. 17-71

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BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS AND AMERICAN FOREST RESOURCE COUNCIL IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders ("NAHB") states that it is a non-profit 501(c)(6) corporation incorporated in the state of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

Amicus American Forest Resource Council ("AFRC") is an Oregon non-profit 501(c)(6) corporation with its principal place of business in Portland, Oregon. AFRC has no corporate parents, subsidiaries or affiliates and does not issue stock. No publicly-held company has a ten percent or greater ownership of AFRC.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and account for 80% of all homes constructed in the United States.

Many of NAHB's members, such as Petitioner, are private landowners with reasonable expectations regarding the lawful use of their property. Since a predominant number of the species protected under the Endangered Species Act ("ESA") have the major share of their habitat on private land, critical habitat decisions significantly impact NAHB's members.

The American Forest Resource Council ("AFRC") is a regional trade association whose purpose is to advocate for sustained-yield timber harvests on public timberlands throughout the West to enhance

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[1] Blanket consents from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout California, Idaho, Montana, Oregon, and Washington. Many of AFRC's members have their operations in communities adjacent to federal and state forestlands, and the management of these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves.

AFRC's members, and the communities in which they work, have been affected by reductions in timber harvest resulting from critical habitat designations, on federal, state, and private land, for species such as the northern spotted owl, marbled murrelet, and Canada lynx. AFRC members' timber contracts have been suspended, slowed or cancelled as a result of overbroad critical habitat designations which fail to comply with the ESA's strict requirements. Overbroad designations also threaten AFRC member interests in forest health, federal timber supply, and private forest land because those designations impede forest management projects that promote forest health and provide timber supply.

AFRC and its members have brought legal challenges to the sufficiency of some of these designations. AFRC believes many of the overbroad critical habitat designations would have been significantly less burdensome if the Government faced accountability for its balancing of economic and other impacts.

SUMMARY OF ARGUMENT

Amici's brief focuses on whether the Fifth Circuit correctly withheld judicial review of the Fish and Wildlife Service's decision not to exclude Unit 1 because of the economic impact of the designation.

The Fifth Circuit's determination that 16 U.S.C. § 1533(b)(2) (Section 4(b)(2)) lacks a "meaningful standard" by which to review the Fish and Wildlife Service's decision triggers a question Under Article I of the Constitution—"Did Congress unconstitutionally delegate authority to the Secretary of the Interior?" Amici argue that the Court may avoid this constitutional question because it is reasonable to harmonize ESA Section 4(b)(2) and APA § 701(a)(2) in a manner that permits judicial review.

ARGUMENT

I. THE FIFTH CIRCUIT IMPROPERLY DENIED REVIEW OF THE SERVICE'S DETERMINATION UNDER ESA SECTION 4(b)(2).

A. The Service Concluded That Designating Unit 1 Had Serious Economic Implications.

According to the United States Fish and Wildlife Service ("Service"):

> St. Tammany Parish is a fast-growing area; according to the Louisiana State Census the population grew from 191,268 to 233,740, or 22 percent, between 2000 and 2010. Growth in the Parish is projected to continue, reaching nearly 500,000 by 2030. The area immediately surrounding the proposed critical habitat is experiencing particularly rapid growth. Within the last few years large warehousing facilities have been constructed or have begun construction in Pearl River. A new high school was recently opened not far from the proposed critical habitat and major transportation infrastructure is planned in anticipation of continued rapid growth in the area. In addition, infrastructure improvements have recently taken place on Highway 1088 between Interstate 12 and Highway 36, which runs through the proposed critical habitat. . . . Because Louisiana Highway 36 runs through the

> proposed critical habitat unit, the area is particularly attractive for development.

IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog* ¶ 71, 73 (Apr. 6, 2012) ("Final Econ. Analysis"), JA 81-83.

Moreover, the Service appreciated that the designation of Unit 1 could negatively impact this economic development. Under one scenario the Service determined that Clean Water Act ("CWA") Section 404 permits would be necessary before development could occur in Unit 1 -triggering the Endangered Species Act ("ESA") Section 7 consultation process. 16 U.S.C. § 1536. The Service estimated that this would lead to 60 percent of the area being set aside for dusky gopher frog habitat. *Endangered and Threatened Wildlife and Plants: Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog)*, 77 Fed. Reg. 35,118, 35,141 (June 12, 2012). In another scenario, "the Service . . . recommend[s] complete avoidance of development [of Unit 1] in order to avoid adverse modification of critical habitat." Final Econ. Analysis ¶76, JA 85. Under these scenarios, the lost residential and commercial development opportunities would be $20.5 million or $34.0 million respectively. 77 Fed. Reg. at 35,140-141.

On the other side of the equation, the Service determined that no monetary benefits from the designation could be quantified, but found benefits "expressed in biological terms." *Id.* at 35,141. Yet, when it balanced the $20.5 or $34 million loss to the

landowners against the unquantified biological benefits, the Service "did not identify any disproportionate costs" of designation. *Id.*

B. The Fifth Circuit Failed to Provide Judicial Review.

The Fifth Circuit refused to review whether the Service abused its discretion by failing to exclude Unit 1 from the final designation of gopher frog critical habitat. The decision to preclude review involves an interpretation of the relationship between two statutes, 16 U.S.C. § 1533(b)(2) and 5 U.S.C. § 701(a)(2) (ESA Section 4(b)(2) and the Administrative Procedure Act ("APA")).

ESA Section 4(b)(2) provides that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Furthermore, the Service:

> may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id.

Section 701 of the APA provides that agency actions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2).

Relying on *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), [2] the Fifth Circuit held that the words "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . ." results in a decision unreviewable under APA § 701(a)(2) because these words fail to provide a "meaningful standard" to review the Service's determination.[3] *See Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 473 (5th Cir. 2016). The court, however, failed to fully consider the implications of its holding which includes serious questions as to the constitutionality of Section 4(b)(2).

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[2] In *Chaney*, the Court explained that agency action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830.

[3] The Court below was comfortable with this interpretation because one other circuit and a number of district courts had also ruled that a decision not to exclude an area from critical habitat was unreviewable. *Markle*, 827 F.3d at 473-74.

II. THE FIFTH CIRCUIT FAILED TO ADDRESS THE NONDELEGATION DOCTRINE.

A. The Nondelegation Doctrine Requires Congress to Provide Standards to Guide Agency Actions.

Article I of the Constitution vests all legislative powers in the Congress of the United States. "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Powell, J., concurring). This is known as the nondelegation doctrine. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (explaining that Article I permits no delegation of Congress's legislative powers).

However, "[i]f Congress shall lay down by legislative act an *intelligible-principle* to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added). "The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Loving v.*

United States, 517 U.S. 748, 771 (1996). This Court has explained that Congress has failed to state an intelligible-principle if "there is an *absence of standards* for the guidance of [an agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed . . ." *Yakus v. United States*, 321 U.S. 414, 426 (1944) (emphasis added); *Indus. Union Dep't*, 448 U.S. at 686 (1980) (Rehnquist, C.J., concurring) (explaining that the intelligible-principle rule requires "ascertainable standards" by which a court can test the exercise of delegated legislative discretion).

B. The APA § 701(a)(2) Test And The Intelligible-Principle Rule Are Similar.

As shown above, the test used to determine if APA § 701(a)(2) precludes judicial review requires a court to determine if Congress has provided a "meaningful standard" by which to measure an agency's discretion. If Congress failed to provide a meaningful standard, then judicial review is precluded. Similarly, if there is an "absence of standards" to guide an agency's actions, then Congress may have failed to provide an "intelligible-principle"; thereby unconstitutionally delegating authority to an agency.

Consequently, because of the similarities between these tests, once a court determines that a statute does not provide a meaningful standard (precluding

review under the APA), it should be on guard for questions as to the constitutionality of said statute.[4]

In the case at hand, by holding that Section 4(b)(2) lacks a meaningful standard, the Fifth Circuit triggered a question that it should have answered, or at the very least acknowledged—"Did Congress unconstitutionally delegate authority to the Secretary of the Interior pursuant to Section 4(b)(2)?"

III. ESA SECTION 4(b)(2) AND APA § 701(a)(2) SHOULD BE HARMONIZED TO AVOID THE NONDELEGATION DOCTRINE.

By relying on the canon of constitutional avoidance, this Court can elude the conundrum presented by § 701(a)(2) and the nondelegation doctrine.

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[4] Commentators have recognized, there is a clear tension between APA § 701(a)(2)'s "meaningful standard" test and the "absence of standard" test the Court has articulated to determine whether Congress has provided an intelligible-principle. Viktoria Lovei, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1060 (2006) ("[i]f a statute is so broad that it lacks a guiding policy, the statute may lack an intelligible-principle, in violation of the nondelegation doctrine."); *see* Amee B. Bergin, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?* 28 B.C. ENVTL. AFF. L. REV. 363, 396 (2001) (arguing that "[i]f a court finds that a delegation lacks 'law to apply,' it follows analytically that not only *can* the court find that the delegation lacks an intelligible-principle, but that it *must* do so.").

A. The Canon of Constitutional Avoidance.

As the Court recently stated, "[w]hen 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [it] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Here, interpreting Section 4(b)(2) and § 701(a)(2) to preclude judicial review raises a serious Article I issue. However, as illustrated in the sections below, it is "fairly possible" to construe these statutes in a manner that allows judicial review.

B. The APA Encourages Judicial Review.

The cardinal rule governing the relationship between courts and administrative agencies is that agency action is presumptively subject to judicial review. *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (2015) (stating "this Court applies a 'strong presumption' favoring judicial review of administrative action"); *Sackett v. E.P.A.*, 566 U.S. 120, 128 (2012) (recognizing the APA "creates a

presumption favoring judicial review of administrative action"); *Califano v. Sanders*, 430 U.S. 99, 104 (1977) (discussing "Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials"). Together, the avoidance canon and the presumption of reviewability push strongly toward enabling judicial review of decisions not to exclude critical habitat. The panel majority ignored the reviewability presumption and, in doing so, "falter[ed] at the starting line." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Service*, 848 F.3d 635, 653 (5th Cir. 2017) *reh'g en banc den.*

Off the block the Fifth Circuit read Section 4(b)(2) to insulate the Service's negative exclusion determination from judicial review. It never applied, let alone recognized, the APA presumption favoring judicial review or this Court's interpretation of that presumption. The six-judge dissent from the denial of rehearing en banc found the panel's approach "plays havoc" with the well-established presumption favoring judicial review and constitutes an "abdication of our responsibility to oversee, . . . agency action" for abuse of discretion. *Id.* at 652, 654-655 (Jones, J., dissenting).

Congress passed the APA in 1946 in direct response to concerns over unbridled administrative agency power. In hearings on the APA, Congressman Francis Walter, Chairman of the House Judiciary Committee, in discussing the § 701(a)(2) exception for matters committed to agency discretion by law, remarked that agencies "do not have authority in

any case to act blindly or arbitrarily." H.R. 615, 79th CONG. §10 (1946), *reprinted in* Administrative Procedure Act: Legislative History, 92 CONG. REC. 5750 (daily ed. May 24, 1946)(Westlaw). Senator McCarran, Chairman of the Senate Committee on the Judiciary, further emphasized the "indispensable" value of judicial review "since its mere existence generally precludes arbitrary exercise of powers." 92 CONG. REC. 2159 (1946), *reprinted in* Administrative Procedure Act: Legislative History, H. REP. NO. 79-1980, at 2201 (2d Sess. May 3, 1946). In addition, the House Judiciary Committee noted that all agency decisions are presumptively reviewable absent clear congressional intent to withhold that right:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S. REP. NO. 79-752, at 26 (1st Sess. Nov. 19, 1945).

Congress enacted the APA to capture a wide range of agency activities. "The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] 'generous

review provisions' must be given a 'hospitable' interpretation." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (internal citations and footnotes omitted)(*abrogated on other grounds* by *Califano v. Sanders*, 430 U.S. 99 (1977)). Further, "the Court [has] held that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott*, 387 U.S. at 141 (internal quotation omitted); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (providing that "the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude judicial review.") "A restrictive interpretation of [APA § 704] would unquestionably, in the words of Justice Black, 'run counter to § 10 and § 12 of the [APA]. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes . . . .'" *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Court advanced its first interpretation of the APA's "committed to agency discretion" exception to judicial review. Drawing on the legislative history of the APA the Court explained that § 701(a)(2) is a "very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is *no law to apply*'." *Id.* at 410

(emphasis added)(quoting S. REP. NO. 79-752, at 26 (1945)).[5]

The presumption of reviewability embodied in the APA and its relationship to the § 701(a)(2) exception was further clarified in *Chaney*. In *Chaney*, the Court determined that agency decisions not to pursue enforcement actions are presumptively *unreviewable* absent "law to apply" in the form of substantive guidelines restricting the agency's enforcement discretion. "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'"[6] *Id.* at 830.

Chaney, however, is limited to cases involving agency refusal to initiate enforcement proceedings. The Court left intact the presumption favoring judicial review in cases involving agency discretion not to initiate rulemaking and other

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[5] Similar to the case at hand, the statute in *Overton Park* required the Secretary of Transportation to conduct a balancing of competing interests. *Overton Park*, 401 U.S. at 413.

[6] The primary source of a "meaningful standard" for judicial review is typically the language of the statute at issue. However, *Chaney* did not say that a statute is the only source. The Court only said that a reviewing court must 'have' such a standard. Kenneth Culp Davis, *No Law to Apply*, 25 San Diego L. Rev. 1, 4 (1988). In *Chaney*, the court reviewed the governing statute for standards or guidelines in addition to the agency's own policy statements and regulations before concluding that Congress provided no meaningful standards to guide its review. *Chaney*, 470 U.S. at 836, 839, 853.

nonenforcement decisions. *See Chaney*, 470 U.S. at 825 n.2, 833 n.4.

Hence, in contrast to the Fifth Circuit's interpretation of § 701(a)(2), the APA's legislative history and Supreme Court precedent support a narrow reading of § 701(a)(2).

C. The Fifth Circuit Misread Section 4(b)(2) and § 701(a)(2).

The Fifth Circuit found that Section 4(b)(2) "establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation." *Markle*, 827 F.3d at 474. This conclusion has a textual and a structural problem.

Textually, the APA does not require a claimant to establish a mandatory duty unless a decision compelling action unlawfully withheld is sought pursuant to 5 U.S.C. § 706(1). *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004).

Structurally, the Fifth Circuit erroneously concluded that the presence of some discretion to exercise meant that the entire action was committed to agency discretion by law. Courts that find an action is committed to agency discretion invoke a fully optional process, such as prosecutorial discretion, *Chaney*, 470 U.S. at 831-32, or environmental review, *Burbank Anti-Noise Grp. v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980)

(holding that adequacy of an Environmental Impact Statement was not reviewable where no statement was required). Section 4(b)(2) provides a specific threshold for the exercise of discretion "if [the Service] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habit." It also provides a limit to the discretion: "unless [the Service] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.* This gives ample guidance to determine whether the Service relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The policy concerns that underlay other cases on discretion do not apply here. In the usual situation, "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. ..." *Chaney*, 470 U.S. at 832. But here, the converse applies: the agency's decision not to exclude critical habitat results in the exercise of coercive power over those who would use the subject property. *Infra* pp. 21-26. And the decision not to exclude is part of a larger regulation which is an appropriate subject of review.

On its face, moreover, the Service's finding here does not comply with the mandate of ESA Section 4(b)(2). Section 4(b)(2) requires the Service to take into account the economic impact, and any other relevant impact, before designating critical habitat. Exclusion may occur if the benefits of an exclusion outweigh the benefits of designation. 16 U.S.C. 1533(b)(2). Simply disregarding economic impacts as not "disproportionate" to the designation does not weigh the economic and other impacts against the (slight) benefits of designation. Instead, it implies that no matter the size of the economic impacts, they are acceptable if not out of line with the scope of economic impacts from other critical habitat designations. The ESA does not allow the Service to shift its own goalposts like this. Instead, it requires an individualized inquiry to ensure the economic and other impacts of the specific designation are taken into account.

D. The Fifth Circuit's Opinion is Internally Inconsistent.

Leading up to the designation of gopher frog critical habitat, the Service prepared a draft and a final economic analysis. Between the draft and final the Service had two rounds of comments. 77 Fed. Reg. at 35,140. The final economic analysis quantified the impacts of the designation on the following activities: active species management, residential and commercial development, timber management and military activities. *Id.* For these activities, the Service quantified the costs for 20 years under three different scenarios. *Id.* But it did not monetize or

quantify any economic benefits. And in the end, the Service concluded that there were not "any disproportionate costs that are likely to result from the designation" of Unit 1. *Id.* at 35,141.

According to the Fifth Circuit, Section 4(b)(2) does not provide a "meaningful standard" by which to review the Service's conclusion. However, the court also held that "[s]ection 1533(b)(2) articulates a standard for reviewing the Service's decision *to exclude* an area." *Markle*, 827 F.3d at 474 (emphasis added). Thus, if the Service had conducted the exact same analysis as summarized above, but in the end excluded Unit 1 because the costs were disproportionate, the court would review that decision.[7]

In other words, it is the action taken by the Service in response to Section 4(b)(2) that determines whether 4(b)(2) provides a "meaningful standard." If the Service excludes an area, then the words in Section 4(b)(2) provide a meaningful standard. However, if it decides not to exclude that same area, then those same words provide no meaningful standard. This is inconsistent with the lower court's statement that the *words of the statute* (not the ultimate decision) fail to provide a meaningful standard. *Id.* (providing that the "statute is silent

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[7] The Court of Appeals for the Ninth Circuit has also failed to recognize the inconsistency and held the decision to exclude an area is reviewable. *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015); *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1034 (9th Cir. 2015).

on a standard for reviewing the Service's decision to *not* exclude an area.")

The Court can avoid the internal inconsistency produced by the Fifth Circuit's reasoning by holding that judicial review is available whether the Service decides to exclude an area or not to exclude an area from designation.

E. Agency Action that Constrains The Use of Private Property Must be Subject to Judicial Review.

The Fifth Circuit's opinion begins with a discussion of the "misconceptions" about the impacts of critical habitat designations on private property. The court explains that a designation does not convert private property into a public park or wildlife refuge, open the door to species reintroductions or mandate land management practices in favor of listed species. *Markle*, 827 F.3d 452 at 458. While a designation itself may not immediately restrict particular land uses, it does place the Service in a superior position to extort unjustified concessions from landowners seeking a federal permit or other federal approval. It is this coercive power that accompanies a designation, or decision not to exclude under Section 4(b)(2), that warrants judicial review. 16 U.S.C. § 1533(b)(2). Otherwise, property owners are left with "little practical alternative but to dance to the [Service's] tune." *Sackett*, 566 U.S. at 132 (2012).

In a unanimous decision, this Court in *Sackett* overturned decades of uniform case law prohibiting judicial review of EPA and United States Army

Corps of Engineers ("Corps") compliance orders. After filling in a portion of their property in preparation for the construction of a family home, the Sacketts received an EPA compliance order. The order directed them to immediately "restore" their property and give EPA access to their property and records. *Id.* at 125. The Sacketts had good reason to doubt the presence of "jurisdictional wetlands," but no means to mount a challenge. Like so many courts before it, the Ninth Circuit had found that the CWA precluded the review of compliance orders. *Sackett v. E.P.A.*, 622 F.3d 1139, 1147 (9th Cir. 2010).

The Sacketts faced a dilemma. Ignore the order and wait to be sued to get their day in court, all the while racking up to $75,000 in daily penalties, or halt construction and engage in expensive restoration work to comply with an order they believed to be invalid. The EPA suggested this was a tolerable choice because compliance orders simply "provid[e] a means of notifying recipients of potential violations and quickly resolving the issues through *voluntary compliance*" as opposed to serving as a "coercive sanction that itself must be subject to judicial review." *Sackett*, 566 U.S. at 128-129 (emphasis added).

This Court held that the APA entitled the Sacketts to immediately challenge EPA's compliance order. In doing so, the Court dismantled several arguments advanced by the EPA regarding why the statutory scheme of the CWA impliedly precludes review. It found that nothing in the CWA's statutory scheme was enough to overcome the APA's strong

presumption of reviewability. *Id.* at 128. Nor was this Court moved by EPA's claim that agency efficiency would be undercut if orders were subject to judicial review, stating "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Id.* at 130. The opinion concluded with a warning to overzealous EPA officials: "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review . . . " *Id.* at 130-131.

Four years following *Sackett* this Court continued its trend of judicial skepticism of agency actions having immediate practical consequences on landowner rights with no reasonable opportunity for review. With a unanimous vote, the Court held that a Corps' "jurisdictional determination" ("JD") is final agency action open to immediate challenge under the APA § 704. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 1807 (2016).

Hawkes Co., a peat mining firm, applied for a Corps permit to "fill" a portion of its 530-acre property. Corps officials urged Hawkes to abandon the permitting process, citing extended delays, high costs and an uncertain outcome. When Hawkes refused to back off the permitting process which, if successful, could extend its peat mining operations up to 15 years, Corps officials again discouraged Hawkes from moving forward. Agency officials told a Hawkes employee to "start looking for another job," buried the landowner with paperwork demands

costing upwards of $100,000 and urged the sale of the property to a "wetlands bank." *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 998 (8th Cir. 2015).

Following a two-year delay, the Corps issued an approved JD concluding that Hawkes' property contained "waters of the United States" based on a "significant nexus" between wetlands and the Red River of the North located some 120 miles away. *Id.* Not unlike the landowners in *Sackett*, Hawkes disagreed with the agency's decision and faced an unreasonable choice: (1) abandon its peat-mining operations; (2) apply for and obtain a permit at immense cost, long delay and likely agency-imposed limitations on the full use of the property; or (3) ignore the JD and proceed with mining operations at the risk of significant civil fines and potential criminal penalties. *Id.* at 997.

Hawkes filed suit seeking judicial review of the JD under the APA. In allowing judicial review, the Eighth Circuit remarked on the "coercive effect" of an agency-issued JD which "adversely affects appellants' right to use their property in conducting a lawful business activity." *Hawkes*, 782 F.3d at 1000-1001. It further explained:

> The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps

> will achieve the result its local officers desire, abandonment of the peat mining project, without having to test . . . its expansive assertion of jurisdiction . . . .

Id. at 1001-1002.

This Court unanimously affirmed the Eighth Circuit's ruling that Hawkes was entitled to judicial review under the APA. The Court reasoned that a "negative" determination regarding the presence of jurisdictional waters creates a five-year "safe harbor" shielding property owner from federal prosecution. Conversely, a positive determination triggers legal consequences through the deprivation of that safe harbor. *Hawkes*, 136 S.Ct. at 1814. Furthermore, it emphasized the APA's presumption of reviewability for all final agency actions. *Id.* at 1816 (citing *Sackett*, 566 U.S. at ----).

The concerns the Court had in *Sackett* and *Hawkes* apply equally here. In both prior cases, the Court recognized the agencies' coercive power is amplified absent judicial review. Here, the Service's refusal to exclude Unit 1 on the basis of economic impact solidifies federal control over the property owners' future development activities to the extent those activities require a federal permit or approval. The economic impacts of the federal control are enormous[8] and this gives the Service "extraordinary leverage" over the owners of Unit 1. Tr. of Oral

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[8] Supra pp. 6.

Argument at 48, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 1807 (2016) (No. 15-290).[9]

Furthermore, in *Hawkes* the Court recognized that a negative JD gave the property owner a "safe harbor" and therefore, a positive JD had negative consequences.[10] The same is true here. If the Service had excluded Unit 1 from the designation, then ESA Section 7 would not have any impacts on the landowners' future plans (i.e. a safe harbor from Section 7). Thus, following the reasoning in *Hawkes*, a decision not to exclude Unit 1 denies the landowner the benefits of that safe harbor. And according to the Fifth Circuit, the Service may deny that safe harbor free from the oversight of judicial review.

This Court should continue its recent practice to closely examine the possibility that, when shielded from judicial review, government agencies may use their superior strength to demand unjustified concessions from landowners through constraints on the use of private property. In *Sackett* and *Hawkes* this Court unanimously rejected such abuse by the EPA and Corps. It should apply the same check on the Service here.

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[9] The Service recognized that designation of Unit 1 would interfere with planned development, but "hope[s] to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property" while extending protections for the non-existent gopher frog and its non-habitat. 77 Fed. Reg. at 35,123. The Service's suggestion is disingenuous, as the landowner has little practical alternative but to "work with" the Service.

[10] Supra p. 25.

F. Judicial Review of Section 4(b)(2) Is Essential to Provide Accountability for Designations Much Larger and More Consequential than Unit 1.

Unit 1's designation has imposed negative consequences on the owners of the parcel and the community of St. Tammany Parish. Yet such consequences pale in comparison to landscape-scale impacts from critical habitat designations similarly shielded from judicial review.

One such designation is critical habitat for the northern spotted owl. Across Oregon, Washington, and California, the Service designated 8.5 million acres of critical habitat for the owl in 2012. U.S. Fish & Wildlife Service, *Endangered and Threatened Wildlife and Plants; Designation of Revised Critical Habitat for the Northern Spotted Owl* (Strix caurina occidentalis), 77 Fed. Reg. 71,876 (Dec. 4, 2012). Of the lands designated as critical habitat, more than 2.6 million acres are "matrix lands," which were set aside under the Northwest Forest Plan ("NWFP") to provide a steady supply of federal timber to the local forest products-based economy. 77 Fed. Reg. at 71,876; *id.* at 71,880 (noting that "matrix areas [are] where timber harvest would be the goal."). The Service concluded that "economic impacts to [Forest Service] timber harvest are relatively more likely in unoccupied matrix lands or approximately 1,158,314 acres of 2,629,031 total acres of all [Forest Service] matrix lands." 77 Fed. Reg. at 72,028. The resulting decrease in timber supply is substantial. *Id.*

To place this in context, the Service's 2012 rule designated over 65% of the "matrix" lands as owl critical habitat. U.S. Forest Service and U.S. Bureau of Land Management, *Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl*, April 13, 1994 ("NWFP ROD") at 7.[11] This despite the fact that the NWFP already set aside about 20 million acres in the form of Late Successional and Riparian Reserves and other land allocations. *See* NWFP Standards and Guidelines, at A-5. Such reserves already included areas that "will maintain a functional, interactive, late-successional and old-forest growth ecosystem." NWFP ROD at 6.

In attempting to resolve disputes relating to forest management, the NWFP promised, in President Clinton's words, to "produce a predictable and sustainable level of timber sales . . ." NWFP ROD at 3. The Forest Service concedes the NWFP was expected to "provide predictable levels of resource outputs and recreation opportunities, which would in turn provide predictable levels of employment. *This was not achieved with respect to timber supply.*" U.S. Forest Service, *Social and Economic Status and Trends, Northwest Forest Plan: The First 20 Years, Report*, Report No FS/R6/PNW/2015/0006, Feb. 2016, at 57 (emphasis added). Not surprisingly, the failure to offer stable timber supply coincided with

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[11] Documents relating to the NWFP are available electronically at the website of the Regional Ecosystem Office, *https://www.fs.fed.us/r6/reo/nwfp/documents/* (*last visited* April 25, 2018).

substantial downturns in rural population and vibrancy. *See id.* at 39 (showing metropolitan population increase by 8 percent since 1994 and nonmetropolitan decrease by 10 percent). President Clinton's promise to rural communities was not met.

In revising the critical habitat for the spotted owl, the Service disregarded the economic dislocation that had already occurred and waved away concerns about continued disruption.

The Service concluded "only a portion of the overall proposed revised designation will result in more than incremental, minor administrative costs." 77 Fed Reg. at 71,946. It further discounted economic effects by claiming there could be positive or negative effects. *Id.* at 71,947. But the Service did not exclude a single acre based on economic effects, instead exercising its Section 4(b)(2) discretion only to exclude areas under conservation agreements, programs and partnerships. *Id.* at 71,890. The Service concluded its analysis with the following remarkable assertion:

> While there is uncertainty over whether such [economic] impacts will occur and to what extent, even assuming higher economic impacts suggested by some commenters, we would not exclude these lands from designation under section 4(b)(2) because a critical habitat designation on these [matrix] lands will have benefits in conserving this essential habitat.

77 Fed. Reg. at 71,947. By a logical reading of Section 3(5)(A), all critical habitat must have some sort of conservation benefit. 16 U.S.C. § 1532(5)(A). But under the Services' approach, federal lands with any conservation benefit whatsoever would not be excludable. Thus, the non-reviewability of exclusion decisions allows the agency to rewrite the governing statute.

Meaningful economic analysis is feasible. For example, the first spotted owl critical habitat rule, issued in 1992, recognized "the overall effects on the Northwest timber industry and to some counties in particular, were potentially severe . . . " U.S. Fish & Wildlife Serv., *Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Northern Spotted Owl*, 57 Fed. Reg. 1796, 1807 (Jan. 15, 1992). As a result, the first designation excluded some federal lands to mitigate the worst job losses. *Id.* at 1807-08.

The Service also made use of its powers to coerce changes to governing land use plans. The final rule explained that it "does not change land use allocations or Standards and Guidelines for management under the NWFP." 77 Fed. Reg. at 71,880. In the same breath, however, the Service asserted conservation outside NWFP reserves "is increasingly important for species recovery." *Id.* at 71,881. In essence, the Service arrogated to itself the authority to rewrite the governing Forest Plan without the public process that normally accompanies such initiatives. *See* 16 U.S.C. § 1604;

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 729-30 (1998).

Even where its critical habitat designation is subject to challenge on the merits, the Service has denied the existence of economic impacts in disputing the standing of affected stakeholders. Although the Service initially obtained a dismissal of a challenge to the spotted owl critical habitat rule, *Carpenters Indus. Council v. Jewell*, 139 F. Supp. 3d 7 (D.D.C. 2015), the D.C. Circuit reversed. The Circuit Court held "the Service's designation will likely cause a decrease in the supply of timber from designated forest lands." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017). The court further held the Services' "argument to the contrary belies the text, purpose, and operation of the Final Rule designating the critical habitat in this case. Not to mention, it defies basic common sense." *Id.*

On a number of occasions, the Service has unduly discounted, or denied altogether, the negative impacts of its critical habitat designations. This refusal to acknowledge economic impacts has been insulated from judicial review by decisions like the one below. Providing for judicial review will ensure that the heavy hammer of critical habitat designation does not swing blindly.

CONCLUSION

The Fifth Circuit's decision to withhold judicial review raises serious constitutional issues under the nondelegation doctrine. There are, however, ample

reasons to harmonize APA § 701(a)(2) and ESA Section 4(b)(2) to allow for judicial review. Thus, the Court should avoid the constitutional question, and reverse the lower court's decision.

Dated: April 30, 2018

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No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY & INTEREST OF *AMICI CURIAE*[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and its territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases raising issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. It offers regional, national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

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1. Pursuant to this Court's Rule 37.6, counsel for *Amici Curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *Amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus* briefs.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans, and 49 state municipal leagues.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance through advocacy and by developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Amici have a substantial interest in the proper resolution of this case. State and local governments are better equipped to balance species preservation with the economic and social impact that can occur when such preservation requires restrictions on land use. Ensuring

that states and localities are consulted when the Fish and Wildlife Service makes exclusion decisions is therefore paramount. If the agency can avoid judicial review of such decisions, it will have no incentive to consult those who are experts in the land-use issues that exclusion decisions most affect. It thus is vitally important that the Fish and Wildlife Service not escape judicial review.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2012, the Fish and Wildlife Service (FWS) designated several tracts of land as a critical habitat for the dusky gopher frog. One of those tracts consists of 1,544 acres of commercial forest located in St. Tammany Parish, Louisiana. Because the dusky gopher frog has not lived on that land in over 50 years and cannot even survive there without a radical change in the land's features, Petitioner asked FWS to exclude it from the critical habitat designation. FWS refused. That decision may ultimately restrict all development on the land, imposing up to $34 million in losses to the private landowners.

Petitioner sought judicial review of that decision, as well as the underlying critical habitat designation. Despite the immense economic impact of FWS's action, the Fifth Circuit held that federal courts cannot review it because it is "discretionary." Among other things, Petitioner argues here that a decision not to exclude land from a critical habitat is subject to judicial review. *Amici* agree and write separately to explain that FWS cannot overcome the presumption that its actions are reviewable and to emphasize how exempting its decisions from review harms states and localities in particular.

This Court is skeptical when the Executive Branch argues that an agency's decisions are unreviewable in court. Judicial review of the President's and his subordinates' decisions has been a bedrock principle of our government since almost the Founding. Without it, the Court has explained, statutory limits on agency power are only paper guarantees.

Recognizing the importance of judicial review, the Court has required the federal government to overcome a "strong presumption" that agency decisions are subject to the scrutiny of federal courts. As a result, Congress must be clear in its statutes' language or structure that an agency's action is exempt from review. Absent either, the agency must defend its decisions in court just like any other defendant.

The Fifth Circuit failed to acknowledge (much less apply) this presumption when it held that FWS's decision not to exclude land from the dusky gopher frog's critical habitat was unreviewable. Had it done so, it would have discovered that no language in the Endangered Species Act (ESA) specifically exempted that decision from review. Nor would it not have found the necessary clarity in the ESA's structure.

The Fifth Circuit instead thought that FWS's decision not to exclude land from a critical habitat is unreviewable because "there are no manageable standards" for doing so. That position is strange, however, because the Fifth Circuit agrees there *are* standards for reviewing a decision *to exclude* land from a critical habitat, *i.e.*, the other side of the coin, because Section 1533(b)(2) tells the agency to decide whether "the benefits of exclusion

outweigh the benefits of designation." But Courts are capable of applying that same standard to decisions *not to exclude* just as well. The Fifth Circuit was wrong to conclude otherwise.

This narrow view of the federal courts' power to review FWS's decisions has harsh practical consequences. The regulation of land has always been within the bailiwick of states and localities. Land is inherently local and those who are closest to it are best equipped to address the unique issues surrounding its use. Localities have traditionally used that knowledge to encourage economic development and to manage population growth. They have also used it to preserve endangered or threatened species. And they have done so while mitigating the impact on the regional economy.

That same expertise is needed when FWS is making decisions about critical habitat designations. A single designation can cost local economies billions of dollars, especially if it is done haphazardly. Deciding what land to exclude from such a designation is therefore critically important. But FWS has little incentive to accommodate local expertise for its exclusion decisions if those decisions are not subject to judicial review. Without a safety net to catch its errant decisions, FWS can act without fear that its actions will be dissected and effectively ignore local concerns.

This case highlights the problem. Though Section 1533(b)(2) calls for FWS to balance "the benefits of exclusion" against "the benefits of designation," FWS refused to exclude the land despite the designation imposing up to $34 million in losses on the landowners

without any offsetting preservation benefit. Only the lack of judicial accountability can explain that result.

ARGUMENT

I. A Decision Not to Exclude Land from a Critical Habitat is Subject to Judicial Review.

The Court has always been skeptical when told the Executive Branch's actions are unreviewable. From the beginning, it has understood that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803). And there is no place "in a government of laws and of principle" for an executive official to, "at his discretion, issue this powerful process ... leaving to the [citizen] no remedy, no appeal to the laws of his country; if he should believe the claim to be unjust." *United States v. Nourse*, 34 U.S. 8, 8-9 (1835). Otherwise, "statutory limits would be naught but empty words." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 n.3 (1986) (quoting B. Schwartz, Administrative Law § 8.1, p.436 (2d ed. 1984)).

Congress has also recognized the need for judicial review of agency actions. "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases." *Id.* at 671 (quoting H.R. Rep. No. 1980, at 41 (1946)). That is why "[i]t has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified." *Id.* (quoting S. Rep. No. 752, at 26

(1945)). Were it otherwise, Congress's "statutes would in effect be blank checks drawn to the credit of some administrative officer or board." *Id.* at 671 (quoting S. Rep. No. 752, at 26 (1945)). For these reasons, "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015).

Against this backdrop, the Court has imposed on the federal government "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review" of an agency decision. *Bowen*, 476 U.S. at 673 (citation omitted). The Court's "cases have established that judicial review ... will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* at 670 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)); *see also Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (calling prohibitions on judicial review "a very narrow exception."). And that "persuasive reason" must come from Congress itself. The presumption thus can be overcome only if "a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining*, 135 S. Ct. at 1651; *see also Califano v. Sanders*, 430 U.S. 99, 109 (1977) (stating that the Court "will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence.").

The Fifth Circuit failed even to acknowledge this presumption, much less explain how FWS has rebutted it. Nor could it have. To that end, the first sentence of Section 1533(b)(2) requires FWS to designate a critical habitat "on the basis of the best scientific data available and after

taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The second sentence allows FWS to "exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. *Id.*

All agree that a critical habitat designation under the first sentence of Section 1533(b)(2) is subject to judicial review. *See* Pet. App. 15a-32a; Gov't C.A. Br. 22-36. All also agree that a decision to exclude land from a critical habitat under the second sentence is also subject to judicial review. Pet. App. 35a; Gov't C.A. Br. 40. It should follow, then, that a decision *not* to exclude land likewise is subject to judicial review. Nothing in the statute's language or structure suggests otherwise. There is no provision expressly exempting such decisions from judicial review. And there is nothing in the statute's structure that suggests an exemption. Quite the opposite. The Court has already recognized that the ESA's focus on "economic consequences" shows that one of its "objective[s] ... is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). The only way to check such zealous pursuit is through judicial review.

It is no surprise, then, that Fifth Circuit and the government have not relied on any statutory language for their contrary position. Instead, they rely almost entirely on the notion that "there are no manageable standards for reviewing the Service's decision not ... to exclude an area from a critical habitat." Pet. App. 34a; *see also* Gov't Br. in Opp. 29. But that is not true. The government agrees that Section 1533(b)(2) "provides a judicially manageable

standard to judge the agency's decision *to exclude* areas from critical designation." Gov't C.A. Br. 40. Namely, the statute permits FWS to exclude land if "the benefits of exclusion outweigh the benefits of designation." *Id.* But courts can scrutinize FWS's application of that balancing test whether it grants exclusion or not. *C.f.* Pet. App. 160a n.21 (Jones, J., dissenting from denial en banc) ("[T]he Service's decision ***not to exclude*** Unit 1 is really part and parcel of the decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as a critical habitat is judicially reviewable."). It is just two sides of the same coin.

If there were any doubt that FWS's exclusion decision here is reviewable, *Bennett* removes it. There, the Court disagreed with the government's position that a decision to designate a critical habitat was unreviewable. *Bennett*, 520 U.S. at 172. The government argued that the permissive language in Section 1533(b)(2)—that "[t]he Secretary *may* exclude any area from critical habitat"—meant FWS's decision regarding designation was unreviewable. *Id.* The Court responded that just because FWS had the "discretion" to designate a critical habitat did not mean its decision not to do so was unreviewable. *Id.* Rather, it meant that FWS's "ultimate decision" on whether land will fall within a critical designation was reviewable for an "abuse of discretion." *Id.*

Any reliance on *Heckler v. Chaney*, 470 U.S. 821 (1985), for the contrary conclusion is misplaced. In that case, prison inmates challenged the FDA's refusal "to take various investigatory and enforcement actions" against states using drugs for lethal-injection that had not been approved for that purpose. *Id.* at 824. *Heckler* recognized that "an agency's decision[s] not to prosecute or enforce" are "generally committed to an agency's *absolute*

discretion" and, for that reason, the presumption is flipped and judicial review is generally not available. *Id.* at 831 (emphasis added).

The unique nature of enforcement actions drove the Court's decision in *Heckler*. The Court noted there is little need for judicial review of enforcement decisions because when an agency declines to enforce the law "it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. Such decisions are also unreviewable because they resemble a prosecutor's decision "not to indict" and that is "a decision which has long been regarded as the special province of the Executive Branch." *Id.* Like all such prosecutorial decisions, an agency must assess "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* at 831.

Neither of those factors are at play under the ESA or this case. To start, FWS *has* exercised its coercive power by designating the property as a critical habitat. The decision not to exclude any of the property from the habitat may prohibit all development on the entire 1,544-acre tract—nearly 2.5 square miles—which would result in a $34 million loss to the owners. *See* Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118, 35,141 (June 12, 2012) ("Final Rule"). This exercise of federal power is undeniably coercive. And the decision whether to exclude the property from a critical habitat is far afield from the role of a prosecutor. It requires no

balancing of agency resources beyond the decision itself. *Heckler* is inapposite.

II. Insulating Exclusion Decisions from Judicial Review Allows the Agency to Ignore State and Local Land-Use Expertise.

Exempting exclusion decisions from judicial review has practical consequences as well. Federal agencies are generally required to consider outside expertise when issuing new regulations. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). FWS is no different. In this case, for example, FWS received comments addressing the designation's negative impact on St. Tammany Parish's economy and tax revenues, as well as on development in the areas surrounding the critical habitat. *See* Final Rule, 77 Fed. Reg. at 35,126-27. But without the prospect of judicial review, FWS had no incentive to seriously consider that expertise while addressing exclusion. Indeed, when decisions *to* exclude are subject to judicial review while decisions *not* to exclude are exempt, as the Fifth Circuit held, FWS is incentivized to choose the latter out of convenience. By doing so, it can avoid the work of defending its decision in court. This result unfortunately means that FWS can ignore those who are closest to the land-use issues most affected by critical habitat designations.

A. States and localities are well-positioned to preserve endangered species while balancing key local interests.

States and localities have had "traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*,

531 U.S. 159, 174 (2001). In fact, the "regulation of land use is perhaps *the* quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added). This is not a "historical accident." Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 Harv. J. on Legis. 289, 296 (2011). Land "by its nature ... is inherently local" because "[i]t exists within definite metes and bounds and cannot be moved." *Id.*

Because "local economic markets and environments differ," "they are not easily susceptible to generic statewide and national solutions." John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 Pace Envtl. L. Rev. 821, 853 (2006). For that reason, "[l]ocal and county governments are often the only levels of government that have the capacity to discover and act on the preferences of local constituencies." *Ostrow, supra*, at 296. They "are intimately familiar with local circumstances and have a great stake in economic success and protecting the quality of community life." *Nolon, supra*, at 853. As a result, they are well positioned to manage growth and to protect the welfare of their particular citizens. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926) (noting "with the great increase and concentration of population, problems have developed, and are constantly developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities").

St. Tammany Parish is no different. From 2000 to 2010, the parish's population grew 22%, increasing from 191,268 to 233,740 people. *See* Industrial Economics, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, 4-1 ¶ 71 (April 6, 2012), https://

perma.cc/NQT9-ZQD9. The parish accommodated that growth by opening a new high school, planning a major transportation infrastructure project, and allowing significant new private construction. *Id.* But because much of the new growth has surrounded the critical habitat at issue in this case, the parish's ability to manage its future population growth, which is expected to increase 100% by 2030, is in flux. *Id.*

Notably, states and localities like St. Tammany Parish do more than just accommodate population and economic growth. They also engage in environmental protection:

- In Florida, state and local efforts continue to defend local manatees even after FWS downgraded their federal protection from endangered to threatened. *See* Florida Fish and Wildlife Conservation Commission, Florida Manatee Program, https://perma.cc/8C3E-XMLQ. Not only do Florida's manatee protections date back to 1893, but the state manages an extensive protection program that is largely supported by individual donations and dedicated state funding. *Id.*

- In Maine, there are four ongoing state-level projects aimed at protecting the Blanding's and Spotted Turtles. *See* Maine Department of Inland Fisheries and Wildlife, Rare Turtles, https://perma.cc/SQ4T-AJL6.

- In Washington, "local efforts to conserve salmon have been ongoing since statehood." Christine O. Gregoire & Robert K. Costello, *The Take and Give of ESA Administration: The Need for Creative Solutions in the Face of Expanding Regulatory Proscriptions*, 74 Wash. L. Rev. 697, 700 (1999).

State and local governments have also balanced conservation efforts with regional economic concerns. For example, FWS has listed the Utah prairie dog as a threatened species. *See People for Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv.*, 852 F.3d 990, 995 (10th Cir. 2017). Yet the prairie dog had already received extensive protection under state law. Before its designation, Utah generally prohibited the taking of a Utah prairie dog without permission; and it provided a layered enforcement approach depending in part upon the type of land at issue and the local population of prairie dogs. *See* Utah Admin. Code R657-70-5–70-12. Utah law also provided for capture and relocation of Utah prairie dogs interfering with developable land. *See* Utah Admin. Code R657-70-10(b)(ii). This resulted in state wildlife officials relocating more than 3,200 Utah prairie dogs from roughly two dozen sites to 11 new locations between 2009 and 2012, as well as repatriation to habitats from which the prairie dog left. *See* S. Nicole Frey, *Managing Utah Prairie Dog on Private Lands*, Utah State University Extension, at 4 (Feb. 2015), https://perma.cc/UA89-RG52.[2]

Efforts like these demonstrate that local communities are well-equipped to spearhead endangered species protections while also protecting local economic interests. At the very least, then, FWS should be receptive to state and local interests when deciding whether to exclude land from a critical habitat.

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2. Utah repealed these rules because they conflicted with the prairie dog's designation as a "threatened" species under the ESA. *See* Taking Utah Prairie Dogs, 2017 Utah Reg. Text 468,526 (Sept. 15, 2017).

B. FWS has little incentive to harness state and local expertise and account for ESA's massive costs if its decisions are unreviewable.

Local expertise is crucial when FWS is making decisions about critical habitat designations because those decisions can impose massive costs on states and localities. A recent survey of such designations for 159 species found that over 60 million acres has been designated critical habitat. *See* Brian Seasholes, *The Critical Nature of Critical Habitat Decisions*, Reason Foundation (June 1, 2016), https://perma.cc/8JFR-URK3. Those designations are set to impose an estimated $10 billion in costs over the next 20 years. *Id.* Just a few examples show how much a single designation can affect local economies and individuals:

- The proposed critical habitat designation for the northern spotted owl in Washington was estimated to impact—directly or indirectly—nearly 123,000 forestry related jobs and over $5 billion in wages every year. *See* Suzanne Hearn, *Northern Spotted Owns: The Cost of Critical Habitat Designation*, Forest2Market (Mar. 29, 2012), https://perma.cc/ER67-B737.

- FWS estimated that its critical habitat designation for the California red-legged frog would cost up to $500 million over two decades, affecting everything from residential and commercial development to agriculture and ranching. *See* Revised Designation of Critical Habitat for the California Red-Legged Frog, 75 Fed. Reg. 12,816, 12,858 (Mar. 17, 2010).

- FWS estimated its critical habitat designation for the green sturgeon would have annual impacts up to $74 million per year. *See* Final Rulemaking to Designate Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon, 74 Fed. Reg. 52,300, 52,301 (Oct. 9, 2009).

The direct economic losses in this case are similarly severe. FWS estimates the critical habitat designation for the dusky gopher frog could cause $34 million in lost opportunities to develop the land. *See* Final Rule, 77 Fed. Reg. at 35,141. And those losses do not include an estimated $17.1 million in untapped oil and gas reserves and $6.93 million in timber resources that the designation may prohibit. *See* Industrial Economics, *supra*, at ¶ 88.

Private parties are not the only ones who suffer these costs. "Considerable regulatory burdens and corresponding economic costs are borne by ... state and local governments ... as a result of critical habitat designation." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10678, 10680 (Aug. 2013). These designations can impede economic activity and lower property values, which can severely impact tax revenues. In 2012, for example, it was estimated that the proposed habitat designation for the northern spotted owl would result in the annual loss of $4.2 million in tax revenue. Hearn, *supra*. Those reduced revenues, in turn, strain crucial public services that localities provide. *See, e.g.*, Michael Newman, *Oregon School Districts' Fiscal Future Tied to Fate of Northern Spotted Owl*, Education Week (May 30, 1990), https://www.edweek.org/ew/articles/1990/05/30/09420034.h09.html

But unlike their state and local counterparts, FWS is not naturally attuned to these concerns. Federal agencies simply "know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 577 (1985) (Powell, J., dissenting). That is why Congress specifically instructed FWS to decide whether "the benefits of ... exclusion outweigh the benefits of specifying [an] area as part of the critical habitat." 16 U.S.C § 1533(b)(2).

Yet there is no way to guarantee that FWS will heed Congress's instruction if its exclusion decisions are unreviewable. Judicial review's "availability is a constant reminder to the administrator." Louis L. Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 408 (1958). It "make[s] the agency's exercise of delegated authority more acceptable by ensuring that its discretion can be checked against standards set by Congress." John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 413 (2010). And, for that reason, it is the ultimate "guard against unauthorized or arbitrary governmental action." *Id.* But when an agency can "police its own conduct," *Mach Mining*, 135 S. Ct. at 1651, the regulated are "left to the absolutely uncontrolled and arbitrary action of a public and administrative officer." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902).

This case demonstrates the principle. Congress intended FWS to use caution when exercising its power to designate critical habitats. *See* H.R. Rep. No. 95-632, at 18 (1978) ("[T]he Secretary should be exceedingly

circumspect in the designation of critical habitat outside of the presently occupied area of the species."). And Congress amended the ESA specifically to "increase the flexibility in balancing species protection and conservation with development projects." H. Rep. No. 97-567, at 10 (1982). Despite that, FWS imposed $34 million in losses with no corresponding benefit, as the dusky gopher frog cannot live on the designated 1,544 acres in St. Tammany Parish. The FWS then refused to exclude any part of that property from the designation. Exempting that decision from judicial review only encourages more of this kind of "needless economic dislocation," *Bennett*, 520 U.S. at 176, because there is no pressure on agency officials to abide Congress's directives. And, in the process, FWS can ignore the expertise that states and localities provide in this arena.

Indeed, the need for accountability is acute here because there is reason to believe that FWS's efforts at preserving species are largely ineffective: only 80 species have been removed from the threatened and endangered list, which now includes more than 2,250 animal and plant species. And more than a third of those removed were due to extinction or data errors, as opposed to successful recovery.[3] Judicial review of the FWS's costly actions is therefore crucially important to prevent arbitrary and unnecessary decisions.

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3. *See* FWS delisting report, https://perma.cc/FJ22-XUU5.

CONCLUSION

For all these reasons, this Court should reverse the Fifth Circuit's decision.

Respectfully submitted,

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In The Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether decisions of the U.S. Fish and Wildlife Service "not to exclude" areas from critical habitat under Section 4(b)(2) of the Endangered Species Act are immune from judicial review.

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INTEREST OF *AMICUS CURIAE*[1]

National Federation of Independent Business Small Business Legal Center

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Small Business Legal Center (the "Legal Center"), frequently files *amicus* briefs in cases that will impact small businesses. The Legal Center files this *amicus* brief to provide a voice in these proceedings for

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[1] *Amici* National Federation of Independent Business and Building Industry Association of the Bay Area file this brief with the consent of all parties, which have filed their blanket letters of consent with the Clerk. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, counsel for *Amici* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no other person or entity other than *Amici*, their members, and their counsel contributed monetarily to the preparation or submission of this brief.

the rights of small business landowners. Their land is often one of their most valuable assets both in terms of financial investment and for their practical operations. It is highly problematic for ranchers, farmers, and other small business landowners when they are denied their common law right to put their lands to productive uses and profoundly concerning if they are denied the right to seek meaningful and timely judicial review of government-imposed restrictions under the Endangered Species Act ("ESA"). For similar reasons, the Legal Center participated as *amicus curiae* in *Sackett v. EPA*, 132 S.Ct. 1367 (2012), and *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807 (2016).

Building Industry Association of the Bay Area

Building Industry Association of the Bay Area ("BIABA"), a nonprofit association of builders, contractors, and related trades and professions involved in the residential construction industry, represents the interests of its members and the residential construction industry in Northern California. A part of BIABA's mission is to ensure that there is sufficient geographic territory available to its members on which they may conduct their residential construction activities. BIABA's members have been adversely impacted by overly broad ESA critical habitat designations. Several lower federal courts have determined that some such designations are not judicially reviewable under the Administrative Procedure Act ("APA").

BIABA was the lead plaintiff in *Building Industry Association of the Bay Area, et al. v. United States Department of Commerce, et al.*, 792 F.3d 1027 (9th Cir. 2015), *cert. denied*, 137 S.Ct. 328 (2016), in which the Ninth Circuit held that the National Marine Fisheries Administration was immune from judicial review for its decision not to exclude vast areas of the California, Oregon, and Washington coasts from critical habitat designation for the Northern Distinct Population Segment of the Green Sturgeon. The Ninth Circuit's opinion imposed substantial negative economic impacts on BIABA's members, which will continue to be harmed to the extent that courts make rulings immunizing any aspect of critical habitat designation under the ESA from judicial review. BIABA has also engaged in substantial other federal litigation involving the implementation of the ESA by the U.S. Fish and Wildlife Service, including listing and delisting decisions and critical habitat designation.

The Court is considering two issues in this case: (1) Whether the ESA prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation, and (2) Whether an agency decision not to exclude an area from critical habitat because of economic impact of designation is subject to judicial review. *Amici* are particularly interested in the reviewability issue, which goes to the heart of the ability of landowners to seek relief from government overreach. Accordingly, this brief addresses solely the issue of whether decisions

not to exclude areas from critical habitat are immune from judicial review.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit held that decisions of the U.S. Fish and Wildlife Service (the "Service") to exclude areas from critical habitat under ESA Section 4(b)(2) are subject to judicial review while decisions not to exclude areas from critical habitat are immune from judicial review. The holding is illogical, inconsistent with the text of Section 4(b)(2), contradictory to the ESA's purposes and structure, and at odds with the ESA's legislative history. Furthermore, the lower court's holding clashes with the strong presumption in favor of reviewability firmly established in the APA and prescribed by legal tradition.

Crucially, the four-step process required by the ESA to designate critical habitat demonstrates that the Service's designations are subject to judicial review regardless of outcome. First, if the Service determines that a species requires ESA protection, it lists the species as either "endangered" or "threatened," depending upon the degree to which the species is at risk.

Second, for each protected species, the Service develops a candidate list of geographic areas to be considered for critical habitat designation and studies the conservation benefits to the species that would result from designating each area.

Third, the Service considers the economic impact of designating each area as critical habitat.

Fourth, the Service makes a final decision to designate or not to designate each particular area under consideration based upon a balancing of the conservation benefits to the species against the economic impacts of designation. Thus, the Service's sole task in the fourth step is to determine what areas to leave out of critical habitat and what areas to leave in. By deciding what to leave out, the Service necessarily decides what to leave in, and vice versa. This fourth step, which is the focus of the reviewability issue before the Court, is set forth in the second sentence of ESA Section 4(b)(2).

Judicial review of a decision made under Section 4(b)(2) is governed by the APA, under which there is a strong presumption of reviewability, which can be rebutted only by a showing that the Service's action has been either: (1) explicitly made immune from judicial review by Congress, or (2) implicitly committed to agency discretion by law because there is no law for courts to apply. It is undisputed that Section 4(b)(2) does not explicitly immunize critical habitat decisions from judicial review. The dispute is whether any particular types of critical habitat decisions are implicitly immunized from judicial review.

The lower court held that, while decisions to exclude areas from critical habitat are subject to judicial review because there is law to apply (*i.e.*, for abuse of discretion), decisions not to exclude are immune from

judicial review because there is no law to apply. But if there is law to apply with regard to decisions to exclude, that same law applies to decisions not to exclude. Either all critical habitat decisions under Section 4(b)(2) are subject to judicial review, regardless of result, or none of them are. It is the process itself that is reviewable for abuse, as explained by this Court in *Bennett v. Spear*, where the Service was required to redo a critical habitat designation because it failed to address economic impacts as mandated by Section 4(b)(2): "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." 520 U.S. 154, 172 (1997).

Further, as the *Bennett* Court observed, one of the ESA's goals "(if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 176-77. Accordingly, given the centrality of economic considerations in the critical habitat designation process, Congress could not have intended to provide for judicial review when the Service decides to exclude areas from critical habitat based on economic impacts while at the same time blocking judicial review when the Service decides not to exclude areas based on the same economic impacts. Such a one-way, outcome-determinative reviewability standard has never been sanctioned by this Court.

The lower court's ruling also is contrary to Congressional intent as reflected in the ESA's legislative history. Section 4(b)(2) was enacted as an amendment

to the ESA in 1978 in part as a response to this Court's statement in *Tennessee Valley Authority v. Hill* that, under a previous version of the ESA, species must be protected "whatever the cost." The amendment specifically required the Service to consider costs in designating critical habitat. It is unlikely that Congress would have amended the ESA in such a manner if it had intended to hinge reviewability on the outcome of the decisionmaking process, thereby reverting to the pre-1978 standard whenever the Service happened to decide, "whatever the cost," not to exclude an area from critical habitat. Under such circumstances, the economic impacts study mandated by the 1978 amendment as the third step of the critical habitat designation process would be relegated to a useless paper exercise.

Moreover, the lower court's decision is contrary to the strong presumption that executive actions are subject to judicial review, a principle enshrined since the early history of this Court in *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 316 (1795), which held that unchecked and unreviewable executive action would be a threat to the foundations of "Republican Government." Ever since *VanHorne's Lessee*, this Court has held to the presumption that, subject to certain limited exceptions not present here, executive actions are judicially reviewable, especially where, as here, private property rights are impacted.

Accordingly, the lower court's ruling that the Service's decisions not to exclude areas from critical habitat are immune from judicial review defies logic, is

inconsistent with the ESA's statutory text and structure, overlooks the relevant legislative history, and goes against the long-standing presumption of reviewability.

ARGUMENT

I

THE ESA'S TEXT REQUIRES, AND LOGIC DICTATES, THAT DECISIONS "NOT TO EXCLUDE" AREAS FROM CRITICAL HABITAT BE SUBJECT TO JUDICIAL REVIEW

Claims challenging actions taken by the Service under ESA Section 4(b)(2) are governed by the APA. *See Bennett*, 520 U.S. at 171-75 (holding that a claim challenging the Service's "maladministration of the ESA" is not reviewable under the citizen suit provisions of the ESA, but is reviewable under the APA). There is a strong presumption under the APA that agency actions are subject to judicial review. *See Mach Mining, LLC v. E.E.O.C.*, 135 S.Ct. 1645, 1651 (2015), *Sackett v. EPA*, 132 S.Ct. 1367, 1373 (2012).

The APA provides that agency action may be immune from judicial review only in rare cases where Congress expressly precludes review or where the action is implicitly "committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to

judicial review.") (citation omitted) (abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (Judicial review "is available absent some clear and convincing evidence of legislative intention to preclude review."). Express preclusion must be made by Congress in "unmistakable terms." *Barlow v. Collins*, 397 U.S. 159, 166 (1970). Absent express preclusion, judicial review is available except "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (internal quotation marks omitted). Judicial review is precluded implicitly when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Thus, preclusion of judicial review is not to be lightly inferred; rather, it must be demonstrated that Congress obviously intended an agency action to be unreviewable. *See Sierra Club v. Peterson*, 705 F.2d 1475, 1479 (9th Cir. 1983).

ESA Section 4(b)(2) is comprised of two sentences. On its face, the text does not explicitly immunize from judicial review decisions "not to exclude" areas from critical habitat:

> The secretary shall designate critical habitat . . . after taking into consideration the economic impact . . . of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he

> determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

The lower court held that the permissive language used in the second sentence (*i.e.*, the term "may") implicitly places decisions "not to exclude" outside the reach of judicial review. This Court disagrees. *Bennett*, 520 U.S. at 172 (reasoning that the use of the term "may exclude" in Section 4(b)(2) does not undercut "the fact that the Secretary's ultimate decision is reviewable [under the abuse of discretion standard])."

Moreover, in addressing reviewability under the APA more broadly, this Court made the following distinction in *Heckler*:

> [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect [but] when an agency *does* act . . . that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to

> determine whether the agency exceeded its statutory powers.

470 U.S. at 832 (emphases in original). Here, the Service *acted* when it designated critical habitat because it "exercise[d] its coercive power" over private property by imposing substantial restrictions on the use, enjoyment, and development of such property. *See* Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envt'l. L. Rep. News & Analysis 10,678, 10,680 (2013) ("Considerable regulatory burdens and corresponding economic costs are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation."); *see also* Matthew Groban, Case Note, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give a Hoot About the Public Interest It "Claims" to Protect?*, 22 Vill. Envt'l. L.J. 259, 279 (2011) (Critical habitat designations "have the ability to ruin individuals' lives.").

Accordingly, under *Heckler*, action to exclude or not to exclude areas from critical habitat "can be reviewed to determine whether the agency exceeded its statutory powers," 470 U.S. at 832, and under *Bennett*, such actions are reviewable for abuse of discretion. 520 U.S. at 172. Thus, the artificial distinction made by the lower court between exclusion decisions and decisions "not to exclude" finds no support in *Heckler* or *Bennett*.

The lower court's citations to decisions of the Ninth Circuit in support of its unreviewability holding

are to no avail. The citations to *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989-90 (9th Cir. 2015), and *Bldg. Industry Association of the Bay Area, et al. v. U.S. Dep't of Commerce, et al.*, No. 13-15132, 2015 WL 408-761 at 8 (9th Cir. July 7, 2015), for the proposition that the statute's permissive term "may" requires a finding of unreviewability of "not to exclude" decisions, is contrary to *Bennett's* teaching that the abuse of discretion standard applies to the Service's decisions. *See* 520 U.S. at 172. And it is antithetical to *Heckler's* teaching that there is law to apply where agencies exercise coercive power over property rights. *See* 470 U.S. at 832. The lower court's decision is also contrary to the well-established principle that permissive language used in a statute does not imply unreviewability. *See Barlow*, 397 U.S. at 166 (statute authorizing Secretary of Agriculture to promulgate regulations "as he may deem proper" does not preclude judicial review). For the same reasons, the lower court's citations to a handful of district court decisions at odds with the foregoing precedents of this Court are unavailing. *See* Slip Opinion at 29-30.

Two recent decisions of the D.C. Circuit rejected agencies' assertions of a lack of manageable judicial standards where, as here, they had acted pursuant to a discretionary provision using the permissive term "may." In *Amador Cty. v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), a section of the Indian Gaming Regulatory Act stated that the Secretary of Commerce "may disapprove" a compact for only three particular reasons. The court held that the use of this permissive language

followed by the articulation of reasons for the exercise of that discretion indicated that the "use of 'may' is best read to limit the circumstances in which disapproval is allowed." *Id.* at 381. In *Dickson v. Sec'y of Def.*, 68 F.3d 1396 (D.C. Cir. 1995), the court examined a provision granting discretion to the relevant agency: it "may excuse a failure to file [for a correction of military record] within three years after discovery if it finds it to be in the interest of justice." *Id.* at 1399 (citation omitted). The court likewise rejected the assertion of a lack of manageable judicial standards, reasoning that the permissive term "may" did not indicate unfettered discretion as "this construction would mean that even if the Board expressly found in a particular case that it was 'in the interest of justice' to grant a waiver, it could still decline to do so." *Id.* at 1402 n.7. Accordingly, simply because the ESA Section 4(b)(2) uses permissive language does not mean that decisions "not to exclude" are unreviewable. *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 695 (1990) (observing that "the APA contains compelling internal evidence" rejecting the view that the presence of agency discretion precludes judicial review).

Furthermore, an expansive application of the "no law to apply" concept raises profound constitutional and public policy questions. *See* Amee B. Bergin, Comment, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?*, 28 B.C. Envtl. Aff. L. Rev. 363 (2001) (suggesting that a wholly unreviewable grant of discretionary power would violate the nondelegation

doctrine); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332, 1339 (2008) ("In a legal culture that is firmly committed to judicial review, wedded to reasoned decisionmaking, and devoted to a fair and regular process, there is little space for the exercise of unreviewable legal power that is dispensed without reason and without the need to be consistent.").

Moreover, the distinction made by the lower court between the reviewability of excluding an area and not excluding an area from critical habitat under Section 4(b)(2) is illogical. The first sentence of Section 4(b)(2) requires economic impacts to be taken into account in designating critical habitat. The second sentence mandates the manner in which such economic impacts must be considered (*i.e.*, balancing of the conservation benefits of inclusion vs. the economic benefits of exclusion). The lower court concluded that agency abuse of the balancing-of-the-benefits requirement provides a sufficient standard for purposes of judicial review when the Service decides to exclude an area from critical habitat but not when it decides to include an area as part of critical habitat. According to the lower court, the standard is sufficient for judicial review when the government decides to leave an area out but not sufficient when it decides to leave an area in. It defies logic that the Service could determine what to exclude without at the same time determining what to include. To be out of bounds one must know what is in bounds.

If the abuse of discretion standard provides a meaningful standard to review a decision to exclude,

then a decision not to exclude can be reviewed applying the same standard. Once a candidate list of potential critical habitat areas is established, a decision as to what areas will be left out necessarily determines what areas will be left in. Either all inclusion or exclusion decisions, regardless of outcome, are reviewable, or none of them are. Because the lower court acknowledges that decisions to leave areas out are reviewable so too must be decisions to leave areas in.

II

THE OBJECTIVES AND STRUCTURE OF THE ESA REQUIRE THAT DECISIONS "NOT TO EXCLUDE" AREAS FROM CRITICAL HABITAT BE SUBJECT TO JUDICIAL REVIEW

One objective of the ESA is "to provide a program for the conservation of . . . endangered species and threatened species," 16 U.S.C. § 1531(b), while "another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-77. Those dual objectives of species conservation and avoidance of unnecessary economic dislocation are reflected in the structure of the ESA.

The protection of species from extinction is governed by a four-step process. First, before a species receives ESA protection, it must be listed as "threatened" or "endangered." A "threatened" species is "any species which is likely to become an endangered species within

the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). An "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing decisions must be based purely on conservation criteria. Economic or other factors may not be considered in making a listing determination. *See* 16 U.S.C. § 1533(a)(1)(A)-(E).

Second, for threatened or endangered species, the Service has a duty under the ESA and applicable regulations to develop, "to the maximum extent prudent and determinable," a list of geographic areas that may serve as critical habitat for the species. 16 U.S.C. § 1533(a)(3)(A). In relevant part, critical habitat is defined as

> the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection.

16 U.S.C. § 1532(5)(A).

Third, under the first sentence of ESA Section 4(b)(2), before designating "any particular area" as critical habitat, the Service must consider the economic impact of such designation. 16 U.S.C. § 1533(b)(2).

Fourth, under the second sentence of ESA Section 4(b)(2), the Service "may exclude any area from critical habitat if [it] determines that the benefits of exclusion

outweigh the benefits of specifying such area as part of critical habitat." *Id.*

Accordingly, while economic factors may not be taken into account in determining whether or not to list a species as endangered or threatened, the economic impacts of critical habitat designation must be considered before any area is actually designated. *Id.*; *see also Bennett*, 520 U.S. at 172. Thus, listing decisions must exclusively further the statutory objective of species' conservation, while critical habitat designations must take into account both the conservation objective and the objective of avoiding "needless economic dislocation." *Bennett*, 520 U.S. at 176-77. It is untenable that one of the "primary" objectives of the ESA (the avoidance of needless economic dislocation) would be left by Congress entirely to the discretion of the government. Yet immunizing from judicial review any decision by the Service "not to exclude" an area from critical habitat regardless of economic impacts leaves a "primary" objective of avoiding economic dislocation to the unfettered discretion of the Service and leaves impacted landowners without a remedy. "In expounding a statute, we must not be guided by a single sentence, . . . but look to the provisions of the whole law, and to its object and policy." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)); *see also* Norman J. Singer, 2A *Sutherland Statutory Construction* § 45:8 (7th ed. 2007) ("Explanation of the purpose [of a statute] is a way of focusing attention on an

insight that is often helpful in making a judgment about intent or meaning.").

Thus, critical habitat designation under Section 4(b)(2) is the specific part of the ESA where Congress has required the government to focus on the economic objectives of the Act. "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The text of Section 4(b)(2), coupled with the design and structure of the Act, forecloses the lower court's holding that exclusion decisions are reviewable while decisions not to exclude are not. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 568 (1995); *Boise Cascade Corp. v. United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (Courts "must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 861 (1984) ("[T]he meaning of a word must be ascertained in the context of achieving particular objectives."). Accordingly, Congress could not have intended the Service to exercise unfettered and unreviewable discretion as to how it will implement a primary objective of the ESA, namely, that of avoiding "needless economic dislocation,"

whenever it decides "not to exclude" an area from critical habitat designation. *Bennett*, 520 U.S. at 177.

Furthermore, the decision to exclude or not to exclude is governed by the same statutory criteria, *i.e.*, balancing the conservation benefits against the economic impacts. *See* 16 U.S.C. § 1533(b)(2) (whether "the benefits of such exclusion outweigh the benefits of specifying such area as part of critical habitat"). Accordingly, Congress could not have intended, and it would be nonsensical, for the availability of judicial review to depend upon the result of the indivisible process of determining what to leave in and what to leave out. "Statutory construction is a holistic endeavor and . . . the meaning of a provision is clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18 (2001) (internal quotation marks and citation omitted; brackets in original); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."); *Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989) ("[S]tatutory language cannot be construed in a vacuum.").

In *Mach Mining*, this Court examined the requirement of Title VII of the Civil Rights Act of 1964 mandating that, before EEOC could sue an employer for violations of that statute, the agency must first

"endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The court of appeals had held that "the statutory directive to attempt conciliation is not subject to review" because "that provision entrusts conciliation solely to the EEOC's expert judgment and thus provides no workable standard of review for courts to apply." *Mach Mining, LLC*, 135 S.Ct. at 1650 (internal quotation marks and citations omitted). This Court first reiterated that there exists "a strong presumption favoring judicial review of administrative action," noting that if "a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct," the agency could meet its "heavy burden in attempting to show that Congress prohibit[ed] all judicial review of the agency's compliance with a legislative mandate." *Id.* (internal quotation marks and citations omitted; brackets in original).

EEOC argued that it had met that burden because Title VII provided "no standards by which to judge its performance of its duty to conciliate," that it had "broad leeway . . . to decide how to engage in, and when to give up on, conciliation," and thus Congress had provided no "judicially manageable criteria with which to review EEOC's efforts." *Mach Mining, LLC*, 135 S.Ct. at 1652 (citations and internal quotation marks omitted). While acknowledging that "the statute provides the EEOC with broad latitude over the conciliation process," the Court rejected the government's argument that "Congress has [] left everything to" the

agency's discretion, noting that if EEOC took an employer to court without making an attempt at conciliation, there would be "a perfectly serviceable standard for judicial review." Importantly, the Court noted that the conciliation provision contained "concrete standards" relevant to what such an "endeavor" must include. Because the provision made the goal of conciliation "eliminat[ing] [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion," the agency would necessarily be required to communicate among the parties, exchanging information and views about the particular claim. *Id.* If the EEOC did not take those actions, it would not satisfy Title VII and courts would have judicially manageable standards to so determine. *Id.*[2]

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[2] Compare *Webster v. Doe*, 486 U.S. 592 (1988), where this Court evaluated a provision of the National Security Act that granted the Director of the CIA the authority to terminate any employee when the Director "shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. § 403(c). Given that this empowered termination not only where it is satisfied under some external standard, but whenever the Director "deems" it satisfied, the provision "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review . . . and [was] thus 'committed to agency discretion by law'" and unreviewable by courts. *Webster*, 486 U.S. at 600 (quoting 5 U.S.C. § 701(a)(1)). The *Webster* Court bolstered this point by referencing the "overall structure of the [National Security Act]." Another provision of that statute gave the Director the duty of "protecting intelligence sources and methods from unauthorized disclosure," *id.* (quoting 50 U.S.C. § 403(d)(3)). The Court had previously stated that "[t]he plain meaning of the statutory language, as well as the legislative history of the National Security Act, . . . indicates that Congress vested in the Director of Central Intelligence very broad authority

Just as in *Mach Mining*, the overall goals and procedures concretely articulated in surrounding language of the provision at issue serve to provide judicially manageable standards for the agency's decision to not exclude areas from critical habitat designation. Economic impacts must be considered in relation to any benefits from designation or exclusion. The criteria of balancing economic impacts against conservation benefits provides a cogent and judicially manageable standard upon which to review critical habitat designations for abuse of discretion, regardless of result. Any agency decision failing to satisfy that standard is unlawful and must be set aside.

Moreover, there is a substantial body of law available for courts to apply in reviewing the Service's decisions not to exclude areas from critical habitat under ESA Section 4(b)(2). "Agencies must rely on facts in the record and its decisions must rationally relate to those facts." *See Bowen v. Am. Hosp. Assoc.*, 476 U.S. 610, 626 (1986). "Federal administrative agencies are required to engage in reasoned decisionmaking. Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan v. EPA*, 135 S.Ct. 2699, 2706 (2015) (internal quotation

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to protect all sources of intelligence information from disclosure." *Id.* at 601 (quoting *CIA v. Sims*, 471 U.S. 159, 168-69 (1985)). Because the discretionary termination provision was "part and parcel of the entire Act," the "language and structure" of the provision "preclud[ed] judicial review of these decisions under the APA." *Id.* No such national security objectives, language, or structural elements are to be found in the ESA.

marks and citations omitted). Agency action is lawful only if it is based "on a consideration of the relevant factors." *Motor Vehicle Mfrs. Assn. of United States v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Agency action is arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem" or has "offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* at 44. Accordingly, the lower court's ruling that there is "no law to apply" in connection with the Service's decision not to exclude an area from critical habitat is contradicted by a long line of cases decided by this Court requiring the opposite conclusion. At the very least the record must demonstrate that the agency gave reasoned consideration to economic impacts.

III

THE LEGISLATIVE HISTORY OF THE ESA SHOWS THAT CONGRESS INTENDED AGENCY DECISIONS "NOT TO EXCLUDE" AREAS FROM CRITICAL HABITAT BE SUBJECT TO JUDICIAL REVIEW

This Court held under an earlier version of the ESA that the statute was intended by Congress to conserve species "whatever the cost." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). Partly in response to that decision, Congress enacted amendments to the ESA in 1978, Pub. L. No. 95-632, 92 Stat. 3,751 (Nov. 10, 1978), expressly requiring a consideration of

economic impacts in connection with critical habitat designation.[3] *Id.* Sections 11, 92. Stat at 3,766. Those amendments gave the Service the authority to exclude areas from critical habitat based on a balancing of the conservation benefits of inclusion versus the economic benefits of exclusion. The lower court's decision undoes Congress's effort to include economic considerations in the critical habitat decisionmaking process. Absent judicial review of decisions "not to exclude" an area from critical habitat, property owners would have no relief from irrational agency designations that provide little if any conservation benefit while causing substantial economic damage. This Court has refused to accept such unreasonable agency action. *See Michigan*, 135 S.Ct. at 2707 (EPA operated outside "the bounds of reasonable behavior" when it interpreted a provision of

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[3] *See* Committee on Environment & Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, & 1980, at 822 (Congressional Research Service eds., 1982) (statement of Rep. Robert Leggett of California) ("We should be concerned about the conservation of endangered species, but I, for one, am not prepared to say that we should be concerned about them above all else."); *id.* at 919 (statement of Sen. Howard H. Baker, Jr., of Tennessee) ("I do not believe, however, that Congress intended that the protection or management of an endangered species should in all instances override other legitimate national goals or objectives with which they might conflict."); *id.* at 1068 (statement of Sen. William Scott of Virginia) ("People are more important than fish."); *id.* at 1006 (statement of Sen. Edwin Garn of Utah) ("Certainly, in 1973, there was a great environmental push. The Endangered Species Act passed the Senate extremely easily, with no dissenting votes. But, talking to many of my colleagues, I learn that they certainly would not have voted for it if they had known the implications and the extremes to which the act would be carried.").

the Clean Air Act to allow it to "ignore costs when deciding whether to regulate power plants."); *see also Bennett*, 520 U.S. at 172 (observing that "the Secretary's ultimate decision" regarding critical habitat designation "is reviewable . . . for abuse of discretion"). It is pointless to assess the economic impacts of a critical habitat designation if that assessment, as implemented through the exclusion process, is immune from judicial review. The lower court's decision impermissibly converts the Service's obligation to assess economic impacts of critical habitat designation into a meaningless paper exercise, a result that should not be countenanced by this Court. *See Bennett*, 520 U.S. at 172 (holding that the Service has a nondiscretionary duty to assess economic impacts prior to critical habitat designation).

Some details of the ESA's legislative history are particularly informative:

> [T]he 1978 amendments significantly altered the structure of the act by establishing a procedure to *balance* the interests in conserving endangered species against other legitimate national concerns.

A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, & 1980: Together with a Section-by-Section Index (Comm. Print) (1982) at 1348-49 (statement of Representative Bowen) (emphasis added). The balancing procedure envisioned by Congress is reflected in significant part in the balancing-of-the-benefits methodology required by Section 4(b)(2) for critical habitat designation.

In fact, the legislative history of the 1978 Amendments underscores the importance that Congress placed in ensuring full ventilation and analysis of economic impacts in connection with critical habitat designations:

> The 1978 amendments established *much more*, however, than just creating a safety valve in the act. The amendments also required a number of other important changes in the endangered species program which are designed to insure that the program is run in the manner that Congress intended. The act now requires the preparation of *economic impact statements* on proposed critical habitat designations. . . .

Id. at 1349 (emphasis added). Because the requirement to consider economic impacts is "much more . . . than just . . . a safety valve" and calls for the equivalent of "economic impact statements," Congress could not have intended that upon a review of economic impacts a decision not to exclude areas from critical habitat be left entirely to the discretion of the Service. "[Courts] must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. Accordingly, the lower court should have asked itself whether "alternative interpretations consistent with the legislative purpose are available." *See Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982).

There could be no clearer statement of legislative intent than that of Representative Murphy:

> The Conference Report includes the House provision mandating the Secretary to consider the economic impact of designating critical habitat for any species. The Secretary is authorized to alter the critical habitat designation based on this economic evaluation. This is *the most significant provision in the entire bill.*

A Legislative History of the Endangered Species Act of 1973, *supra*, at 1221 (emphasis added) (statement of Representative Murphy). Government decisionmaking in connection with the consideration of economic impacts, characterized on the floor of the House of Representatives as the "most significant provision in the entire bill," could not have been intended to be left to the unconstrained discretion of "agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-77.

IV

THE AVAILABILITY OF JUDICIAL REVIEW IS FUNDAMENTAL TO OUR SYSTEM OF GOVERNMENT AND THE RULE OF LAW

Early in its history, this Court heard a case addressing the issue of whether government encroachment of property rights is subject to judicial review. In *VanHorne's Lessee v. Dorrance*, 2 U.S. 304 (1795), the Court examined a state law that granted a state board authority to make decisions regarding the value of private property. The state argued that the decisions of

that agency were final and not appealable in court. This Court disagreed:

> The proprietor stands afar off, a solitary and unprotected member of the community, and is stript of his property, without his consent, . . . the value of that property judged upon without his participation, or the intervention of a Jury. . . . If this be the Legislation of a Republican Government, in which the preservation of property is made sacred by the Constitution, I ask, wherein it differs from the mandate of an Asiatic Prince?

Id. at 316. The same question could be asked here.

The Service's decision not to exclude the private property of the Petitioners devalues the property and burdens Petitioners' property rights. Indeed, the effect on Petitioners' property here is measured in millions of dollars. Pet. Br. at 32. But the lower court held that the Service's decision injuring these property rights is wholly immune from judicial review.

In enacting the APA, Congress recognized a "strong presumption" in favor of the reviewability of administrative actions, *Mach Mining, LLC*, 135 S.Ct. at 1653, but that presumption long predates the APA. The right to judicial review of executive actions has its origins in natural justice and common law.

Since before the time of Blackstone, it has been "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 W.

Blackstone, Commentaries 23 (1783). The revolutionary generation thought the principle so crucial that several States put it into their constitutions.[4] Justice Marshall explicitly imported this theory into American jurisprudence in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), noting that our Government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Several years later, the Court opined on the importance of reviewability for injuries to rights, noting that it would be a "monstrous heresy . . . [that there should be] . . . no remedy" for a government action that impacted a citizen's rights. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 567 (1838).

The presumption of review is particularly strong with regard to property rights. Indeed, this Court has frequently noted that judicial protection of private property is both the impetus and justification for government. *See, e.g.*, *Calder v. Bull*, 3 U.S. 386, 388 (1798). Judicial protection of property rights is a central element of the social compact:

> The right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.

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[4] *See, e.g.*, A Declaration of Rights and Fundamental Rules of the Delaware State § 12 (1776); 2 Sources and Documents of United States Constitutions 197, 198 (W. Swindler ed. 1775); Md. Const., Art. XVII (1776), 4 *id.*, at 372, 373; Mass. Const., Art. XI (1780), 5 *id.*, at 92, 94; Ky. Const., Art. XII, cl. 13 (1792), 4 *id.*, at 142, 150; Tenn. Const., Art. XI, § 17 (1796), 9 *id.*, at 141, 148.

> Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.

VanHorne's Lessee, 2 U.S. at 310.

Review is particularly important when the injury to property is caused by government. "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals." *United States v. Lee*, 106 U.S. 196, 219 (1882); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (same). In the absence of such tribunals, there remains to the citizen only "the alternative of resistance, which may amount to crime." *Id.*

To avoid this result, this Court has long construed any law "derogatory to the rights of property" narrowly, *VanHorne's Lessee*, 2 U.S. at 316,[5] and generally provides judicial review for government actions affecting property. *Bell v. Hood*, 327 U.S. 678, 684 (1946) (citing *Marbury*, 5 U.S. at 163). In the administrative law context, "the exception of 'discretion' from review shield[s] 'sound' discretion only; it in no wise exempt[s] the

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[5] *See also* Frederick Douglass, *Selected Speeches and Writings*, 386-87 (Lawrence Hill Books, 1999). "Where a law is susceptible of two meanings ... the language of the law must be construed strictly in favour of justice and liberty."

antithetical 'abuse of discretion' from the review expressly directed by [the Administrative Procedure Act]." Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965, 970 (1969). Thus, it has always been the case that government restriction of property rights is generally subject to judicial review.

When James Madison introduced the Bill of Rights in Congress, he noted the importance of judicial review as a fundamental check on the other branches. According to Madison, "independent tribunals of justice" are to be "an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights." 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1790). Alexander Hamilton went further, arguing that limited government "can be preserved in practice no other way than through the medium of courts of justice. . . . Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., Penguin Books 1961). Several decades later, John Bingham, who drafted the Fourteenth Amendment, echoed this sentiment from the floor of Congress, arguing that if individual rights were not enforceable by an action in federal court, the rights were "dead letter."[6]

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[6] Speech of Hon. John A. Bingham of Ohio, In the House of Representatives, February 28, 1866, In support of the proposed amendment to enforce the Bill of Rights (available at: https://archive.org/details/onecountryonecon00bing).

The lower court's opinion not only stands opposed to the text of ESA Section 4(b)(2), the dictates of logic, the objectives and structure of the ESA, and the legislative history, but also to the concepts of limited government, separation of powers, and protection of fundamental rights. *"[U]bi jus, ibi remedium* – for every right, [there is] a remedy." *Towns of Concord, Norwood & Wellesley, Mass. v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992). This legal principle is an integral part of the due process guaranteed by the Constitution. *See* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 San Diego L. Rev. 1633 (2004). The fundamental right to have an independent judicial evaluation of grievances against government action lies at the heart of our system of jurisprudence, and "[a]gencies may not use shell games to elude review." *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1293 (D.C. Cir. 2000). Fundamental fairness requires giving a party aggrieved by government action the "opportunity to be heard." *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Dated: April 30, 2018

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In The
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WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* SAN JUAN COUNTY, UTAH IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

San Juan County[1] encompasses over 5.2 million acres as the largest county in the State of Utah, and is larger than several states. More than 80% of the land in San Juan County is owned or managed by the United States of America, and just 406,000 acres (8%)[2] of the county's land is in private ownership. This leaves very little acreage for private use and development, or local government taxation. Most of the private land in San Juan County lies in a corridor between the Colorado state line on the east and Highway 191 on the west. These lands, like the majority of the private land in San Juan County, are primarily used for family farms and ranches that are the mainstay of the county's rural economy.

In 2014, the U.S. Fish and Wildlife Service ("Service") promulgated two companion regulations under the Endangered Species Act ("ESA"). The first listed the Gunnison sage-grouse as a threatened species and is not at issue here. The second designated 1.4 million acres of occupied and unoccupied critical habitat in Colorado and San Juan County, Utah. *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Gunnison Sage-Grouse; Final

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no person or entity other than this *amicus curiae* made a monetary contribution toward the preparation or submission of this brief.

[2] www.nrcs.usda.gov/, search "San Juan Resource Area", last visited on 4/24/2018.

Rule, 79 Fed. Reg. 69311 (Nov. 20, 2014). In the Monticello-Dove Creek Unit, which includes part of San Juan County, the Service designated more than twice as much unoccupied habitat (236,000 acres) as occupied habitat (107,000 acres). 79 Fed. Reg. at 69338. Despite the vast areas of adjacent federal lands, 86% of the Monticello-Dove Creek Unit is private land. *Id.* at 69339.

As it now stands, roughly 35% of the private land in San Juan County is designated as critical habitat for the Gunnison sage-grouse, including tens of thousands of acres of unoccupied critical habitat on private land. 79 Fed. Reg. at 69357 (copy of Map Gunnison Sage-grouse Critical Habitat attached as Appendix 1). The vast majority of the private land now designated as unoccupied critical habitat is cultivated farmland that does not, and will not, serve as habitat for the Gunnison sage-grouse. In San Juan County, there are enormous areas of federal land – with sagebrush – to the north and south of the unoccupied private land that the Service designated. *Id.* The Service's abuse of its authority to designate unoccupied critical habitat on uninhabitable private land did not end with the dusky gopher frog.

San Juan County is now a party in an ongoing lawsuit challenging the Service's unoccupied critical habitat designation for the Gunnison sage-grouse. *See Center for Biological Diversity, et al. v. United States Fish and Wildlife Service, et al.*, Civil No. 1:15-cv-0130-CMA-STV (consolidated) (D. Colo.). The case is in the merits briefing stage and the issues raised include

the Service's improper statutory interpretation and designation of "unoccupied" critical habitat on private land, and whether the Service abused its discretion when it chose not to exclude the private farmland from the designation of unoccupied critical habitat. Thus, San Juan County has a unique interest to present and the Court's decision in this matter will be of consequence beyond this case.

SUMMARY OF ARGUMENT

The ESA requires the Service to designate "critical habitat" for a species determined to be threatened or endangered. The Service's designation of unoccupied critical habitat on private land without habitat is arbitrary, capricious and beyond statutory right. As a matter of plain language statutory construction, the land designated must provide "habitat" for it to be either critical or habitat for a species. No deference is due to an agency interpretation of a statute that is contrary to its plain language. If the species cannot live on the land and there is no reasonable expectation that it ever could, the Service's action in designating an area as critical habitat essential to the species is arbitrary, capricious, beyond statutory right and should be set aside.

Additionally, the Service's decision not to exclude an area upon weighing the benefits is subject to judicial review. Courts are capable of reviewing the costs and benefits and economic impacts for abuse of

discretion. The ESA provides meaningful standards for judicial review and a court may properly decide whether the Service abused its discretion.

In this case, the dusky gopher frog cannot live on the private Unit 1 lands that the Service designated as unoccupied critical habitat "essential" to the conservation of the species. Similarly, the Gunnison sage-grouse cannot live on the private farms the Service designated as unoccupied critical habitat in San Juan County. The Service's abuse of its authority under the ESA should be reversed.

ARGUMENT

San Juan County, as *Amicus Curiae*, does not seek to repeat or duplicate the legal issues and arguments presented, but to inform the Court of other circumstances and ongoing litigation that may be affected by this Court's decision. Weyerhaeuser Company's Brief for Petitioner ("Pet. Br.") explains how the Service's erroneous interpretation of the ESA resulted in the designation of the private Unit 1 land as critical habitat "essential" to the conservation of the species, even though the land is uninhabitable by the dusky gopher frog. *Id.* at 2-3. If the Service moves frogs there, they will die.

The Service erred because it refuses to acknowledge that "[c]ritical habitat must first be habitat." *Id.* at 4. Of the three elements of dusky gopher frog habitat, the "primary constituent elements" of its

habitat, the Unit 1 land has only one – ephemeral ponds. Pet. Br. 12. Nevertheless, the Service proceeded to designate the Unit 1 lands as "essential" for the frogs even though the other "elements" of their habitat were absent. One of three elements was, apparently, good enough to clear the high bar of "essential" habitat.

The Service employed the same flawed statutory interpretation and logic in San Juan County. The first element for the Gunnison sage-grouse habitat is "[e]xtensive sagebrush landscapes." 79 Fed. Reg. at 69354; *see also id.* at 69322 (requires large, interconnected expanses of sagebrush). The private land designated as unoccupied critical habitat in San Juan County is predominantly agricultural land, not sagebrush landscapes. One of the Service's own peer reviewers noted that many of the areas in San Juan County "may not contain suitable habitat." 79 Fed. Reg. at 69316. The Service responded: "Unoccupied habitat does not need to contain the [primary constituent elements], the standard is instead 'essential for the conservation of the species.'" *Id.* So it is that the Service can designate an area as "essential" critical habitat even though the land does not contain the species' habitat.

The Service designated tens of thousands of acres of private land in San Juan County as unoccupied critical habitat for the Gunnison sage-grouse. The Service did so even though most of the land is uninhabitable by the grouse and has no viable chance to become habitat for the species. In designating the private farmland as unoccupied habitat, the Service acknowledged

the disconnect between habitat and the land it was designating. "Unoccupied lands are designated here because they are 'essential for the conservation of the species' and these areas do not stop at land ownership boundaries." 79 Fed. Reg. at 69321. "We recognize that in areas with a high proportion of private ownership and with more intensive land uses (such as agriculture), the conservation of these populations will be more difficult than in less developed areas." *Id.*

The carefully crafted administrative language, used for the dusky gopher frog and the Gunnison sage-grouse, admits that the Service does not control the uses of private land, but hopes to have others change how they use their land. "Our landscape level approach used in this critical habitat designation generally does not consider land ownership." 79 Fed. Reg. at 69321. Given that there are no frogs living there and the private landowners would be freed from the undisputed burdens of the critical habitat designation, the simple fact is that the relief Petitioner requests will aid the landowners and will not harm the dusky gopher frog. Granting relief to Petitioner may equally serve to benefit the private landowners in San Juan County, without harming the Gunnison sage-grouse.

I. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES THE DESIGNATED LAND TO ACTUALLY BE HABITAT.

Congress did not authorize the Service to designate random land or water for the conservation of an endangered species. Rather, it authorized the agency

to designate "habitat." "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Court should not defer to the Service's interpretation of its unoccupied habitat authority when it conflicts with the plain language and intent of the ESA.

Critical habitat under the ESA, by definition, includes only the "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). The "physical or biological features" that satisfy the ESA's requirements are termed Primary Constituent Elements ("PCE"). 50 C.F.R. § 424.14(b)(5). PCEs must be "found" on occupied land before that land can be eligible for critical habitat designation. 16 U.S.C. § 1532(5)(A)(i). "That PCEs must be 'found' on an area is a prerequisite to designation of that area as critical habitat." *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 122 (D.D.C. 2004). The Service is prohibited from over-designating habitat and must instead "mount[ ] the proper effort to ensure that PCEs do exist on designated lands." *Id.* at 122-23. "The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation." *Id.*

Unoccupied lands must provide more than just "critical habitat" – they must provide critical habitat that is "*essential* for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). The plain language of the statute requires that unoccupied land be both "critical" and "essential" for the conservation of the species.

The Service is not free to designate acres for the sake of acres. The plain language of the statute requires that unoccupied areas of critical habitat must be 1) habitat suitable for the species, 2) critical, which is something more than general or potential, and 3) essential, being necessary. With these congressional words of limitation in mind, it is impossible to say that uninhabitable land in Louisiana is essential, critical or even habitat for the dusky gopher frog.

II. THE SERVICE'S REVIEW OF THE BENEFITS OF INCLUDING OR EXCLUDING AN AREA IS SUBJECT TO JUDICIAL REVIEW.

Section 4(b)(2) of the ESA requires the Service to "designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). If the benefits of excluding an area from designation outweigh the benefits of including it as critical habitat, the Service may exclude it from

designation if doing so would not result in the listed species' extinction. *Id.*

As a general matter, final agency action is subject to judicial review under the Administrative Procedure Act. *See* 5 U.S.C. §§ 551 *et seq.* In limited circumstances, agency actions are so discretionary that judicial review is improper. These unreviewable "committed to agency discretion" actions arise where there is "no meaningful standard against which to judge the agency's exercise of discretion." *Markle Interests, L.L.C.*, 827 F.3d 452, 473 (5th Cir. 2016) (citation and internal quotation marks omitted). The panel below decided that the Service's decision not to exclude Unit 1 was unreviewable. *Id.* at 474.

Given that the decision whether to exclude an area requires an economic and benefits analysis and the weighing of costs and benefits, there are meaningful standards that may be reviewed for abuse of discretion under the APA. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997). For example, the Service was able to quantify and determine the impact to Unit 1, but was unable to explain any benefits of the action other than indecipherable "biological terms." Pet. Br. 52. The regulations clarify that the designation is to be made "after taking into consideration the probable economic and other impacts." 50 C.F.R. § 424.12(a). If the Service cannot explain its consideration of the required factors, its action should be declared arbitrary, capricious and an abuse of discretion.

CONCLUSION

For the foregoing reasons, San Juan County respectfully requests the Court to reverse the decision of the Fifth Circuit Court of Appeals.

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App. 1

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BRIEF OF AMICI CURIAE SCIENTISTS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici are prominent scientists with expertise in conservation biology, population biology, ecology, and other fields relating to the interaction of organisms with their environments, including management of endangered and threatened species. Amici support the United States Fish and Wildlife Service's interpretation of "essential" in critical habitat designations for unoccupied areas. Amici include leading scientists who have conducted cutting-edge research on species preservation and recovery that inform society's understanding of habitat. They have joined this brief because they believe the Fifth Circuit correctly held that the Fish and Wildlife Service properly applied the concept of "habitat" under the Endangered Species Act in this case.

The fifteen scientists who join in this brief as amici curiae include, in alphabetical order:

Ronald Carroll, Ph.D. is Professor Emeritus, Graduate Faculty, Odum School of Ecology at the University of Georgia. He is co-author of Principles of Conservation Ecology, one of the most widely used graduate level textbooks in the field, and directed the University of Georgia Institute of Ecology for over six years. He has expertise in conservation biology, sustainable development, plant-animal interactions, forest regeneration, and invasive species.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution intended to fund the preparation or submission of this brief. The parties have all filed blanket consents to amicus briefs.

Francesca J. Cuthbert, Ph.D. is Professor of Fisheries, Wildlife and Conservation Biology, University of Minnesota. She is a Fellow of the American Ornithological Society and has been designated a Recovery Champion by the U.S. Fish and Wildlife Service. She has worked as a researcher and conservation biologist on the recovery of the endangered Great Lakes population of piping plovers for more than 30 years. At listing, only 11-17 pairs were documented in one state, nesting on two Great Lakes. In 2017-18, 76 pairs were recorded in five Great Lakes states, plus Ontario, and birds had reoccupied all five Great Lakes.

Paul R. Ehrlich, Ph.D. is Bing Professor of Population Studies and President, Center for Conservation Biology, Stanford University. He investigates a wide range of topics in population biology, ecology, evolution, and human ecology and evolution. He received the MacArthur Fellowship. Dr. Ehrlich is a fellow of the American Association for the Advancement of Science, the United States National Academy of Sciences, the American Academy of Arts and Sciences, and the American Philosophical Society. He is a Crafoord Laureate (an explicit substitute for the Nobel Prize in fields of science where the latter is not given), Tyler Laureate, Fellow of U.S. National Academy of Sciences, and Foreign Member of the Royal Society of London.

Bill Laurance, Ph.D. is Distinguished Professor, College of Science & Engineering, James Cook University (Australia). He holds an Australian Laureate Fellowship, one of Australia's highest scientific awards. His research focuses on the impacts of intensive land-

uses, such as habitat fragmentation, logging, hunting and wildfires, on tropical forests and their biodiversity. To date he has published eight books and over 400 scientific and popular articles. He is a fellow of the American Association for the Advancement of Science and former president of the Association for Tropical Biology and Conservation. Dr. Laurance has received many scientific honors including the BBVA Frontiers in Ecology and Conservation Biology Award, a Distinguished Service Award from the Society for Conservation Biology, and the Heineken Environment Prize.

Simon Levin, Ph.D. is James S. McDonnell Distinguished University Professor in Ecology and Evolutionary Biology, Princeton University. His research interests are in understanding how macroscopic patterns and processes are maintained at the level of ecosystems and the biosphere. Dr. Levin is a Fellow of the American Academy of Arts and Sciences and the American Association for the Advancement of Science, and a past President of the Ecological Society of America, among other professional organizations. Levin received the Robert MacArthur Award (1988), Distinguished Service Citation (1998), and the Eminent Ecologist Award (2010) of the Ecological Society of America.

Julie Lockwood, Ph.D. is Professor of Ecology, Evolution and Natural Resources at Rutgers University. Professor Lockwood's research specializes on threatened and endangered animals in the United States, including species that are dependent on wetland and

grassland ecosystems. Her expertise is in demography, population dynamics and habitat use. She has authored or co-authored over 100 journal articles and book chapters.

Lynn Maguire, Ph.D. is Professor of the Practice Emeritus of Environmental Decision Analysis, Nicholas School of the Environment, at Duke University. Dr. Maguire was a member of the National Academy of Sciences panel that authored *Science and the Endangered Species Act* (National Academy Press, 1995). She is a current member of the National Center for Socioenvironmental Synthesis working group assisting the U.S. Fish and Wildlife Service with decision tools for allocating resources among activities to recover listed species, and has over 35 years' experience using decision analysis for research and management of endangered species in the U.S. and elsewhere.

Reed Noss, Ph.D. is President and Chief Scientist, Florida Institute for Conservation Science; Chief Science Advisor, Southeastern Grasslands Initiative; and Visiting Scholar, Nicholas School of the Environment, Duke University. His recent research topics include disturbance ecology; road ecology; ecosystem conservation and restoration; and vulnerability of species and ecosystems to climate change and sea-level rise. He has published several books on ecology and biology. Dr. Noss has served as Editor-in-Chief of Conservation Biology and President of the Society for Conservation Biology. He is an Elected Fellow of the American Association for the Advancement of Science.

Steward Pickett, Ph.D. is a Distinguished Senior Scientist at the Cary Institute of Ecosystem Studies. He is a Fellow of the American Association for the Advancement of Science, the American Academy of Arts and Sciences, and the Ecological Society of America, and a past president of the Ecological Society of America. His areas of expertise include plant ecology, landscape ecology, urban ecology, and disturbance ecology. He was a member of the National Academy of Sciences panel that authored *Science and the Endangered Species Act*.

Stuart Pimm, Ph.D. is Doris Duke Professor of Conervation Ecology at Duke University. He is a world leader in the study of present day extinctions and what can be done to prevent them. His research covers the reasons why species become extinct, how fast they do so, the global patterns of habitat loss and species extinction and the management consequences of this research. The Institute of Scientific Information has ranked him as one of the most highly cited environmental scientists for over a decade. His international honors include the Tyler Prize for Environmental Achievement, the Dr. A.H. Heineken Prize for Environmental Sciences from the Royal Netherlands Academy of Arts and Sciences, the Society for Conservation Biology's Edward T. LaRoe III Memorial Award, and the Marsh Award for Conservation Biology (awarded by the Zoological Society of London).

Peter Raven, Ph.D. is George Engelmann Professor of Botany Emeriti and President Emeritus, Missouri Botanical Garden, Washington University in St. Louis.

He has published more than 700 articles, books, and monographs covering topics in evolution, taxonomy and systematics, biogeography, coevolution, plant conservation, ethnobotany, and public policy, including several textbooks. He received the U.S. National Medal of Science and the MacArthur Fellowship, among other awards; is a former President of the American Association for the Advancement of Science; and serves as a member of National Geographic Society board of trustees.

H. Bradley Shaffer, Ph.D. is a Distinguished Professor in the Department of Ecology and Evolutionary Biology, and founding director of the UCLA La Kretz Center for California Conservation Science at the University of California, Los Angeles. He is an expert in evolutionary biology, ecology, and conservation biology of amphibians and reptiles. Recent research projects include comparative phylogeography of amphibians and reptiles in California and the central U.S., systematics of freshwater turtles and tortoises in Australia, California, and the rest of the globe, and conservation genetics of endangered California amphibians and reptiles.

John Terborgh, Ph.D. is James B. Duke Professor Emeritus of Environmental Science at Duke University. He is a member of the National Academy of Science, and for the past thirty-five years, he has been actively involved in tropical ecology and conservation issues. An authority on avian and mammalian ecology in neotropical forests, Dr. Terborgh has published numerous articles and books on conservation themes. In 1992 he was awarded a MacArthur Fellowship, and

in 1996 he was awarded the National Academy of Science Daniel Giraud Elliot medal for his research, and for his book Diversity and the Tropical Rainforest.

John Vucetich, Ph.D. is a Professor of Wildlife Conservation at the School of Forest Resources and Environmental Science, Michigan Technological University. He is an expert in the population biology of small populations and the human dimensions of conservation. He has made contributions to the scholarly understanding if the Endangered Species Act. I have authored or co-authored more than 100 scientific articles, book chapters, and formal reports. Collectively, they have been cited in the scientific literature more than 2,000 times.

Edward O. Wilson, Ph.D. is University Professor Emeritus, Harvard University. He is recognized as one of the creators of two scientific disciplines (island biogeography and sociobiology), three unifying concepts for science and the humanities jointly (biophilia, biodiversity studies, and consilience), and one major technological advance in the study of global biodiversity (the Encyclopedia of Life). Among more than 100 awards he has received worldwide are the U. S. National Medal of Science, the Crafoord Prize of the Royal Swedish Academy of Sciences, the International Prize of Biology of Japan; and in letters, two Pulitzer Prizes in nonfiction.

SUMMARY OF ARGUMENT

Courts and federal agencies should employ a scientific understanding of habitat, not a dictionary definition, to conserve endangered species and fulfill Congress's mandates under the Endangered Species Act ("ESA" or "Act"). Habitat loss and degradation are the leading causes of species endangerment in North America. Congress commanded that the Fish and Wildlife Service use the "best scientific data available" in designating critical habitat to address species endangerment.

To implement Congress's mandate, the Service must interpret the concept of habitat broadly, applying two core principles when it evaluates what habitat is necessary for species conservation. First, habitat is both spatially variable and temporally dynamic. Second, habitat must be understood broadly to evaluate effectively and accurately species' needs. As corollaries to these principles, several concepts are key: a proper understanding of habitat requires a landscape-scale view; habitats vary in quality, suitability, and location; an area need not be currently occupied or suitable to be essential for the long-term survival of a species; and habitat areas are capable of being restored to more suitable conditions. A definition of habitat that is limited to areas that are currently ideal for a species fails to account for the fact that habitat may vary in quality over space and time. Planning must account for this principle to ensure an endangered species has room not only to survive, but also to recover.

In light of these principles and the important role critical habitat plays in species recovery, the Act requires that the Service include areas essential to species conservation, even where those areas are unoccupied or need restoration. Without landscape scale planning and the ability to designate of a broad range of habitat, including restorable habitat, as critical habitat, the Service cannot fulfill Congress's mandates under the Act.

For these reasons, we conclude unequivocally that the Act requires an inclusive understanding of habitat. Petitioner's narrow unscientific interpretation would fail to provide for the survival and recovery of endangered species, ignoring Congress's plain mandate. To "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. § 1531(b), using the "best scientific data available," courts and agencies must understand critical habitat to encompass all areas essential to that species' recovery.

ARGUMENT

I. Introduction

Since its enactment, the Endangered Species Act has embodied scientific principles in service of Congress's goal of conserving[2] species. The law's purpose

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[2] "Conservation" is a defined term in the Act that includes "all activities associated with scientific resource management": "The terms 'conserve', 'conserving', and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures

is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b).

Scientists agree that habitat loss and degradation are the leading causes of species' endangerment. David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BioScience 607, 607 (1998); *see also* Amy N. Hagen & Karen E. Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*, 20 Conservation Biology 399, 400 (2006). Because of the centrality of habitat in the conservation of biological diversity and populations of organisms, Nat'l Research Council, *Science and the Endangered Species Act* 72 (1995) (hereinafter "NRC Report")[3], any habitat loss generates significant negative impacts. According to one

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include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking." 16 U.S.C. § 1532(3).

[3] The NRC Report was a landmark work, researched and drafted by a team of the most esteemed and knowledgeable scientists working on endangered species conservation. The publisher describes it thus:

> In this volume a distinguished committee focuses on the science underlying the ESA and offers recommendations for making the act more effective.
>
> The committee provides an overview of what scientists know about extinction—and what this understanding

study, "habitat loss accounts for thirty-six percent of extinctions where the cause is known, but likely accounts for a much greater percentage where the cause is not known," given the difficulties of quantifying habitat loss. Jason M. Patlis, *Paying Tribute to Joseph Heller with the Endangered Species Act: When Critical Habitat Isn't*, 20 Stan. Envtl. L. J. 133, 142 (2001) (citing NRC Report). And while "habitat loss has a much larger effect than habitat fragmentation per se on population extinction," Lenore Fahrig, *Relative Effects of Habitat Loss and Fragmentation on Population Extinction*, 61 J. of Wildlife Mgmt. 603, 607 (1997), habitat "destruction and fragmentation . . . are the 2 most important factors in the current species extinction event." *Id.* at 603.

Unsurprisingly, habitat loss and degradation deeply imperil species listed as threatened or endangered under the Endangered Species Act: In fact, habitat destruction and degradation "contribut[ed] to the endangerment of 85%" of ESA-listed species analyzed in a seminal study, Wilcove, *supra*, at 609, and "the majority of recovery plans identify threats to habitat as a significant factor endangering the species." Hagen & Hodges, *supra*, at 400.

Because habitat loss and degradation have been the leading cause of species endangerment, habitat

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means to implementation of the ESA. Habitat—its destruction, conservation, and fundamental importance to the ESA—is explored in detail.

https://www.nap.edu/catalog/4978/science-and-the-endangered-species-act. The NRC Report is available at https://www.nap.edu/read/4978/.

preservation has always been an integral tool for executing that purpose. Various provisions of the Act reflect Congress's recognition of that fact. These include the incorporation of habitat into the determination of a species as threatened or endangered (16 U.S.C. § 1533(a)(1)(A) (listing as a considered factor "the present or threatened destruction, modification, or curtailment of its habitat or range")), designation of critical habitat (16 U.S.C. §§ 1533(a)(3), (b)(2), (b)(6)), development of the recovery plan (16 U.S.C. § 1533(f)(1)(B)), requirement for consultation and prohibition against adverse modification of habitat (16 U.S.C. § 1536), and requirement of habitat "conservation plans" as conditions of private parties obtaining "incidental take" permits (16 U.S.C. § 1539(a)(2)). *See* NRC Report, at 74-75. Together, these provisions reflect "the understanding of conservation biology that certain habitat is essential for species survival" as well as for recovery. NRC Report at 75.

Both the Fifth Circuit and the Federal District Court for the Eastern District of Louisiana acknowledged the broad, conservation-oriented objective of the ESA and correctly upheld the Fish and Wildlife Service's ("the Service" or "FWS") determination that certain areas should be designated as critical habitat because they are essential for the conservation of the gopher frog. Petitioner, however, seeks to narrow the definition of habitat impermissibly to exclude certain kinds of unoccupied habitats, including restorable habitats. Science does not support this narrow construction, which would impair proper implementation of the ESA. Critical habitat designation protects against habitat loss and degradation and, consequently, extinction—precisely the ongoing and urgent

threat to listed species that Congress enacted the Act to address. Therefore, the Court should view habitat as scientists do: at the landscape scale, to facilitate species survival and recovery most effectively.

While social and cultural values, as well as economic considerations, are undoubtedly important and reflected in the ESA, Congress enacted the ESA as an inherently and explicitly science-based tool enacted for the purpose of conservation, requiring that the Service employ the "best scientific data available" in designating critical habitat. 16 U.S.C. § 1533(b)(2). Courts thus should interpret the Act in light of scientific understanding, to ensure the implementation of the Act as Congress intended.

II. Habitat, from a scientific perspective, is dynamic and must be understood broadly

Successful planning and action to promote species survival and recovery, including proper critical habitat designation informed by science, is essential to implementing the Endangered Species Act as Congress intended. Congress commanded that the Fish and Wildlife Service use the "best scientific data available" in designating critical habitat. 16 U.S.C. § 1533(b)(2). To implement Congress's mandate, the Service must apply two core principles when it evaluates what habitat is necessary for species conservation. First, habitat is temporally dynamic and spatially variable. Second, habitat must be understood broadly to evaluate effectively and accurately species' needs.

A. Proper planning for species survival and recovery requires that habitat be understood as dynamic.

The fact that the natural environment is dynamic underpins the scientific understanding of habitat. There is constant "temporal and spatial variation in physical and biotic features of the environment." NRC Report at 134. These movements include, for example, "the rhythm of natural disturbance, the waxing and waning of predator and prey populations, and the cycling of soil nutrients," each of which can "change [] the distribution, growth, abundance, and interaction of species." NRC Report at 95. While change is inevitable, some types and rates of change are more likely to preserve species and ecosystems than others. Reed F. Noss, *Some Principles of Conservation Biology, as They Apply to Environmental Law*, 69 Chi.-Kent L. Rev. 893, 908 (1994). Thus, conservation planning must make appropriate distinctions among the kinds of changes occurring. Moreover, conservation planning cannot singularly "focus[] on protecting today's biodiversity with the assumption that it will be tomorrow's biodiversity." Joshua J. Lawler et al., *The Theory Behind, and the Challenges of, Conserving Nature's Stage in a Time of Rapid Change*, 29 Conservation Biology 618, 618 (2015). Indeed, not accounting for future environmental changes can be fatal and "may fail to adequately protect species in the future." *Id.* Therefore, plans addressing species survival and recovery must also seek to conserve "ongoing evolutionary processes and potential." NRC Report at 95.

As the natural environment is dynamic, so too is what constitutes habitat for a species at any given

moment in time. Habitat is a basic requirement of all living organisms, and thus its protection is crucial to species survival and recovery. Scientists have defined habitat as "the physical and biological setting in which organisms live and in which the other components of the environment are encountered." NRC Report at 71. It is one of "the four components of environment" for species, "along with climate variables, nutrients, and other interacting organisms." *Id.* (citing H.G. Andrewartha & L. Charles Birch, *The Distribution and Abundance of Animals* 26 (1954). Habitat and species are thus "inextricably linked." Patlis, *supra*, at 140.

Both survival and recovery success depend ultimately on "proper consideration of how the species interacts with surrounding biotic and physical environmental factors." NRC Report at 199. For example, habitat that is larger and keeps species well-distributed protects the species more effectively against catastrophes, disturbances, or other negative influences across the habitat range. *Id.* at 131.

B. "Habitat" must be understood broadly, including at the landscape level, to assess effectively and accurately the needs of species.

It is well known to scientists that habitat is heterogeneous, spatially variable, and temporally dynamic, and that these qualities allow species to survive and thrive. Monica G. Turner & Robert H. Gardner, *Landscape Ecology in Theory and Practice: Pattern*

and Process 229-231 (2d ed. 2015).[4] Habitat is confined neither to those areas currently occupied by species, nor to the current conditions of those areas. At a minimum, habitat—as recognized by scientists—has these features: it should be viewed at a landscape scale; may vary in suitability or quality, and this variance itself may change over time; may not be currently occupied; may be restorable or restored; and may be as-yet unrecognized.

1. Habitats should be viewed at a landscape scale.

Scientists generally view habitat at the landscape scale. The landscape is "a large area in which a certain array of ecosystem types is linked by natural disturbance regime, pattern of human land use and disturbance, and distributions of land forms." NRC Report at 97. The landscape view of habitat broadly considers "species' spatial distribution over time" and "highlights the fluxes between patches [of habitat]," because it recognizes that species' habitat needs are context-specific. Patlis, *supra*, at 140 (quoting NRC Report at 96-97). Variability within a landscape is normal, as "[l]andscapes are usually not a binary mosaic of habitat patches and non-habitat matrix, but are comprised of a variety of habitat types placed on a species-specific gradient of habitat qualities." Dagmar Söndgerath & Borish Schröder, *Population Dynamics and Habitat Connectivity Affecting the Spatial Spread of Populations – A Simulation Study*, 17 Landscape Ecology 57, 58 (2002).

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[4] *Available at* https://link.springer.com/book/10.1007%2F978-1-4939-2794-4.

This "spatial heterogeneity in ecological systems at various scales often influences important functions, ranging from population structure through community composition to ecosystem processes." S. T. A. Pickett and M. L. Cadenasso, *Landscape Ecology: Spatial Heterogeneity in Ecological Systems,* 269 Science 331, 334 (1995). Acknowledging both this spatial variability and the dynamic changes in habitat over time enables scientists to understand the needs of species and ecosystems. Thus, the landscape view provides the flexibility necessary to respond to the dynamic characteristics of nature. Researchers have further noted that the landscape view of habitat "is also the *only* way to conserve organisms and processes in poorly known or unknown habitats and ecological subsystems." Jerry F. Franklin, *Preserving Biodiversity: Species, Ecosystems, or Landscapes?*, 3 Ecological Applications 202, 203 (1993) [emphasis in original].

2. Habitats may vary by location and over time in their suitability or quality.

As a corollary of the landscape view of habitat, habitats typically are not defined as specific bounded geographical areas at single points in time. Habitats can shift in suitability or quality through time because of changes in weather patterns, climate, human activity in adjacent areas, or other forces. They can "be created or destroyed by episodic or rare events, such as fire or windstorms." NRC Report at 96. Effective habitat identification and management require an understanding of these variations. David B. Lindenmayer & Joern Fischer, *Habitat Fragmentation and Landscape Change: An Ecological and Conservation Synthesis* 42 (2006).

Moreover, habitats may vary in quality because they are so context-dependent. Habitats may range from those with "higher potential conservation value" and "intermediate potential value" to "lower potential value" (NRC Report at 89), based on such characteristics as size, density, configuration, proximity to other habitats, and interconnectivity. Turner & Gardner, *supra*, at 229. The understanding that habitats vary in location over time and in quality provides the basis of scientists' ability to identify the features of habitat, as a tool both for building scientific knowledge and for species conservation and habitat management.

3. Habitats need not be occupied currently.

Some areas unoccupied at any particular time may be essential habitat, because "that a species is absent from a given habitat does not mean that the habitat is not critical to the persistence of the species." NRC Report at 76. Populations migrate or move for a variety of reasons, on a variety of time scales, for reasons including "response to seasonal cycles, reproductive behavior, localized resource depletion or creation, and a search for protection." *Id.* at 96-97. Moreover, a population may not occupy areas on which it relies for important or essential resources. Because these dynamics often require more habitat than is occupied at a given moment, unoccupied areas may thus be vital habitat for a species or population.

For example, "dispersal habitat" is habitat that "organisms occasionally or periodically disperse through." *Id.* at 101. This type of habitat may also be essential for population or species survival, because they can "be arrayed as stepping stones or unbroken

corridors" that facilitate species' movement to, or between, other habitats. *Id.* Additionally, areas that provide species temporary refuge and resources to recolonize are part of habitat. *Id.* When "physical environmental stress or unusually intense or large disturbances" cause species to leave their regular habitat, these species need areas that provide shelter or areas "in which seeds, larvae, or adults can persist through disturbances and stresses." *Id.*

Moreover, essential habitat may even include areas that, while unoccupied, provide resources crucial to a species' survival. This type of habitat has been recognized in previous critical habitat designations, including habitat providing upstream sources of sediment for the fish species the Santa Ana sucker, 75 Fed. Reg. 77962, 77973 (December 14, 2010), and the source of dune sand for the Coachella Valley fringe-toed lizard, 45 Fed. Reg. 63812, 63818 (September 25, 1980). In these cases and others, the Service has correctly designated the areas as critical habitat even though the species are unlikely to, or even cannot, occupy those areas physically, because the species could not survive without the resources they provide.

4. Habitats may be restored or capable of restoration.

Habitat includes areas that, with some human effort, can be restored to a state that serves threatened or endangered species more effectively. Restoration may include reconstruction of habitat, which entails "reconstitut[ing] ecosystems at alternative sites," NRC Report at 185, or rehabilitation, which seeks to restore degraded habitat to "an ecologically superior state," through management interventions where

necessary. Dan Borg, Ian Rutherford, & Mike Stewardson, *The Geomorphic and Ecological Effectiveness of Habitat Rehabilitation Works: Continuous Measurement of Scour and Fill Around Large Logs in Sand-Bed Streams*, 89 Geomorphology 205, 206 (2007). These practices have led to the improvement or restoration of ecosystem functions and "hold[] much promise for the protection of endangered species," NRC Report at 201, because they often are the only tools to effectively address habitat loss and degradation—the most significant drivers of species endangerment.

Research confirms that, among other things, "[h]abitat restoration results in an increase in population size—and therefore, viability—because of an expansion in available habitat. Importantly, connecting fragments allows immigration from source populations that rescue floundering populations." William D. Newmark et al., *Targeted Habitat Restoration Can Reduce Extinction Rates in Fragmented Forests*, 114 Proceedings of the National Academy of Sciences 9635, 9635 (2017).

5. Habitats may be unknown or unappreciated.

Finally, a broad and dynamic concept of habitat is adaptable to improvements in scientific information, including around unrecognized habitat. Some habitats are suitable despite difficulty understanding fully their historic function for a species. This principle suggests that agencies should err on the side of caution when considering potential habitat areas, and not dismiss potential habitat without investigating

and understanding species' needs. Some areas do not become habitat due to a change in the environment or in species' behavior—they simply are, and have always been, habitat, even if human knowledge has not yet developed that understanding. For example, many ecologically rich habitat types, such as forest canopies, belowground subsystems, and the hyporheic zones, were previously "unappreciated habitats." Franklin, *supra*, at 203. Yet scientists today consider these habitat types integral to the conservation of numerous species.

III. "Critical habitat" should be interpreted to include areas essential to species conservation, even where those areas are unoccupied or need restoration

In its definition of "critical habitat," Congress specifically included "areas outside the geographical area occupied by the species," where the Secretary of Interior finds "that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress recognized that threatened and endangered species may require habitat different from, or in larger area than, currently occupied areas for their populations to survive and recover.[5] In designating all critical habitat, whether occupied or unoccupied, the statute further directs the Service to rely on the "best scientific data available." 16 U.S.C. § 1533 (b)(2); see also *Markle Interests, LLC v. U.S. Fish & Wildlife Service*, 827 F.3d 452, 472 (5th Cir. 2016).

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[5] Even unlisted species show considerable year -to-year variability in habitat occupancy, a dynamic that is likely essential for their survival.

This clear directive in the statute led the Fifth Circuit to uphold the Service's scientific determination and refuse to accept Petitioner's argument, which would uncouple the finding of what habitat is "essential" from scientific principles. As the Fifth Circuit noted:

> "...the ESA requires the Service to base its finding of essentiality on "the best scientific data available." Id. § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.

Markle Interests, LLC, 827 F.3d at 472.

Emphatically, we agree: A non-scientific understanding of habitat is neither helpful nor appropriate in designating critical habitat to fulfill Congress's mandate. The narrow definition of habitat suggested by Petitioner would not only contravene Congress's command to employ the best scientific data available, but also would frustrate the very purpose of the Act:

> "[...] to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."

16 U.S.C. § 1531(b).

In this section we discuss both the importance of incorporating scientific understanding to meet Congress's mandate under the Act, and the scientific understanding of the role that unoccupied habitat, including habitat that may require restoration, plays in ensuring the conservation of threatened and endangered species.

A. Critical habitat designations protect listed species and are necessary to address habitat loss.

Congress enacted Section 4 of the ESA, which allows for the designation of critical habitat, to mitigate some of the damage from habitat loss and thereby facilitate species conservation. Critical habitat "is a valid biological concept" that recognizes certain habitats as "essential for species survival." NRC Report at 75. Nonetheless, despite the central importance of habitat, over half of listed species do not have critical habitat designated.

Contrary to Petitioner's assertions, the critical habitat designation is working where the Service has implemented it. Each designation helps stem the tide of habitat loss and resulting extinction by protecting the physical habitat necessary for species survival and recovery. Martin F. J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 Bioscience 360, 366 (2005). According to a study analyzing data reported by the U.S. Fish and Wildlife Service and National Marine Fisheries Service, "[s]pecies with critical habitat for two or more years appeared to be more likely to be improving and less likely to be declining than species without"; the researchers found their "results suggest that critical

habitat assists species recovery, independent of the length of time listed and the presence of recovery plans." *Id.* at 362. Critical habitat designations also enhance education and public awareness about the listed species and its habitat (Hagen & Hodges, *supra*, at 402), which in turn generates greater public support and federal funding for recovery planning and habitat management. NRC Report at 198. The critical habitat designation thus "confers unique protections," including "more comprehensive protection than might be afforded by piecemeal protection via other regulatory mechanisms." Hagen & Hodges, *supra*, at 402.

B. Habitat "essential for the conservation" of a species" may include unoccupied habitat and habitat that may require restoration.

Petitioner argues that the Fish and Wildlife Service must interpret habitat narrowly, to mean only "habitable" areas, and—in the case of unoccupied areas—only areas where all biologically important features are present. This unscientific interpretation would fail to meet Congress's mandates both to use the best scientific data available, and ultimately to promote species' survival and recovery.

As discussed above, habitat loss and degradation are the primary factors driving species toward extinction. Many listed species are in this perilous position because species occupy smaller and smaller areas as their habitats are degraded or destroyed, causing their numbers to dwindle and reducing their chance of survival. In those cases, if remaining suitable habitat were sufficient to support the species, it would not

have become threatened or endangered. Consequently, limiting habitat to only those areas would thwart the ESA's goal of species conservation, including recovery. In some cases, essential habitat will have to include habitat that may need restoration; otherwise, the sharply limited critical habitat designation would do nothing other than perpetuate the harm that put the species at risk in the first place.

In many cases, recovery will necessarily require that the species can reoccupy some portion of the former range, even if that portion may not currently be entirely suitable. Hagen & Hodges, *supra*, at 404. Where this is true, broader protection of unoccupied habitat is essential to ensure that the species can reoccupy these areas in the future, either through natural dispersal or through managed reintroductions. Abbey E. Camaclang et al., *Current Practices in the Identification of Critical Habitat for Threatened Species*, 29 Conservation Biology 482, 483 (2015). A failure to plan for reintroduction into currently unoccupied areas will likely impede species' recovery, especially in cases where the habitat loss caused the species' decline. *Id.* at 488.

Furthermore, as discussed above, occupied habitat both is spatially heterogeneous and varies over time for many, perhaps all, species. A species may not continuously occupy portions of the species' habitat, and not all portions of habitat serve the same role in supporting species. See, e.g., 75 Fed. Reg., *supra*, at 77973; 45 Fed. Reg., *supra*, at 63818. Species may occupy different portions of their historical range over months or years owing to factors such as seasonal cycles, reproductive behaviors, localized resource depletion or creation, or a search for protection; these areas

may not be suitable for the species continuously over time, but they are certainly habitat for that species. NRC Report at 96-97. A definition of critical habitat that requires an area to possess all features at any given point in time would fail to capture essential areas intermittently occupied by a listed species, or otherwise essential because of resources they may provide for species survival and recovery.

C. Landscape scale planning is crucial in the critical habitat designation process.

Within the critical habitat designation process, assessing habitat at a landscape scale is crucial for species conservation. Incorporation of landscape-scale planning guards against localized extinctions, accounts for the dynamic nature of habitat over time, and captures the spatial variability of habitat quality. Scientists prioritize "protecting an array of biological communities and habitat types within a larger landscape context." NRC Report at 200.

First, protecting unoccupied habitat is immensely important to the conservation of endangered and threatened species because doing so guards against localized extinctions. Species that are already threatened by habitat loss and degradation are even more susceptible to stochastic, or random, threats such as natural disasters. Lindenmayer & Fischer, *supra*, at 73. Flooding, drought, windstorms, hurricanes, fires, and changes in prey availability or reproductive success all pose risks to populations. *Id.* at 73-75. This is especially true for small populations, where an unexpected threat in their limited range could eliminate the remaining members of the species. *Id.* at 73.

Because of the risk that a localized disturbance may force members of a species from their usual habitat by, the long-term survival of species requires that they have areas of refuge or recolonization, where they can relocate temporarily or permanently if their occupied habitat is destroyed. NRC Report at 101. Landscape scale planning for conservation of endangered species, including critical habitat designation, can take the risk of localized extinctions into account and provide nearby restored or mitigated habitat into which the species can disperse. Gary R. Huxel & Alan Hastings, *Habitat Loss, Fragmentation, and Restoration*, 7 Restoration Ecology 309, 313 (1999).

The widely accepted "multiplicity principle" states that it is preferable to have many reserves for a species rather than just a few. Noss, *supra*, at 900. Consistent with this, providing for broader distribution of a species is a crucial conservation strategy. The fact that the ESA allows for listing of distinct population segments, even when the species as a whole is not threatened, incorporates this principle by aiming to prevent local extinctions and preserve significant species populations. *Id.* If critical habitat is interpreted very narrowly, it is more likely that species will be limited to fewer distinct areas. This would make the species more susceptible to stochastic events, which could cause great harm and even extinction.

Second, the dynamic nature of habitat counsels strongly toward using a landscape scale framework to protect habitat. A landscape consists of a patchwork or mosaic of ecosystems, all subject to various disturbances, both natural and human-created. NRC Report at 95-97. A specific patch of habitat may become more or less suitable over time due to a variety of factors.

Id. This landscape scale mosaic changes over time, resulting in changes in population dynamics in any given area. Because of this shifting mosaic of habitat, a species' distribution at any one time may underestimate the range of habitat actually necessary to sustain the species and allow for recovery. *Id.* Thus "an inclusive and dynamic view of habitat" is crucial for recovery planning. *Id.* Recovery planning is far more likely to be successful when it incorporates a landscape view of habitat. *Id.*

Finally, because there is natural variability in habitat quality throughout a species' range over time, a landscape view of habitat is crucial to critical habitat designation. Many individuals in a species' population may live in an area that, while important for the overall diversity of the species, would not be by itself sufficient for the species over the long term. *Id.* at 99. For example, some habitats, referred to as "source habitats," are highly productive. In these areas, reproductive success leads to a growing population. Other areas, known as "sink habitats," are lower quality habitats, where a species has less reproductive success and local population growth is lower than the mortality rate. Sink habitats rely on the relocation of individuals from source habitats to replenish the population. *Id.* at 98. In many species, both are necessary for survival and recovery at any given time.

D. Designation of restorable critical habitat is a crucial tool for the conservation of species.

To ensure species have enough habitat to survive and recover, restorable unoccupied habitat must be an available option for critical habitat designation

where that habitat is essential for conservation of a species. Ecological or habitat restoration involves taking action to address ecosystem degradation and damage, typically caused by humans, and assist in ecosystem recovery. Jose M. Rey Benayas et al., *Enhancement of Biodiversity and Ecosystem Services by Ecological Restoration: A Meta-Analysis*, 325 Science 1121, 1121 (2009). Restoration may involve stopping a degrading activity, removing an invasive species, reintroducing certain flora or fauna, or prescribed burning, to name only a few possible approaches. *Id.* at 1122.

Including unoccupied and degraded habitat in critical habitat designation with plans for future restoration "may also be necessary particularly where habitat loss and degradation have been the primary causes of a species' decline." Camaclang et al., *supra*, at 483. In such cases, habitat restoration and management are "critically important to the species recovery process." Ronald Carroll et al., *Strengthening the Use of Science in Achieving the Goals of the Endangered Species Act: An Assessment by the Ecological Society of America*, 6 Ecological Applications 1, 13 (1996). Conservation of species will require both preventing habitat loss and increasing efforts to restore degraded habitat. Fahrig, *supra*, at 609. To be effective, a listed species' recovery plan must determine the current extent of ideal habitat, assess the quality of remaining habitat, and prioritize areas for restoration. Carroll et al., *supra*, at 13.

Research confirms the importance of habitat restoration in conserving species. A meta-analysis of 89 published scientific assessments of restoration efforts

and outcomes, in a variety of ecosystems on all continents except Antarctica, demonstrates the point. The study aimed to determine whether ecological restoration efforts correlated with changes in ecosystem services and biodiversity. The researchers assessed biodiversity by measures such as "abundance, species richness, diversity, growth, or biomass of organisms present." Benayas et al., *supra*, at 1122. The study showed that measures of ecosystem services and biodiversity were 25% and 44% higher, respectively, after restoration than in the degraded ecosystem before restoration. *Id.* The authors conclude that "ecological restoration is likely to lead to large increases in biodiversity." *Id.* at 1123.

The majority of recovery plans for ESA-listed species require either one-time restoration or ongoing active management of habitat to ensure species recovery. The National Research Council has pointed out that "[e]ach recovery plan is to include 'site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species,'" NRC Report, *supra*, at 75 (citing 16 U.S.C. § 1533(f)(1)(B)), and that "[b]ecause most species are endangered due to loss or degradation of habitat, site-specific actions should include identification, restoration, and management of habitat." *Id.* One study found that "[p]robably the most striking result of our recovery plan analysis is that 63% of the plans were classified as calling for habitat restoration or active management—that is, simply preserving habitat will not be sufficient to recover these species." Theodore C. Foin at al., *Improving Recovery Planning for Threatened and Endangered Species*, 48 BioScience

177, 183 (1998). In light of the evidence, a "habitability" requirement makes no sense and would fail to do what Congress requires.

Critical habitat includes those areas essential for conservation of a species—including recovery. Examples of successful habitat restoration under ESA recovery plans abound, and include, for example, the Golden-cheeked Warbler, U.S. Fish & Wildlife Service, *Golden-cheeked Warbler Recovery Plan*, at 53-55 (1992)[6], and the Karner Blue Butterfly, U.S. Fish & Wildlife Service, *Karner Blue Butterfly Recovery Plan*, at 67-70 (2003)[7]; U.S. Fish & Wildlife Service, Karner Blue Butterfly (Lycaeides melissa samuelis).[8]

Restoring habitat to address the cause of a species' endangerment can prevent extinction risks that have been triggered but not realized. If habitat loss causes endangerment of a species, restoration should target rapid improvement in habitat quality; if small population size is the problem, efforts should restore a large enough area to allow the population to grow. Peter Torok & Aveliina Helm, *Ecological Theory Provides Strong Support for Habitat Restoration*, 206 Biological Conservation 85, 88-89 (2017). Given the ability of such efforts to avoid extinctions, designating restorable unoccupied areas as critical habitat is not only sensible, but also sometimes necessary, to fulfill

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[6] *Available at* https://ecos.fws.gov/docs/recovery_plan/920930f.pdf.

[7] *Available at* https://www.fws.gov/midwest/endangered/insects/kbb/pdf/kbb-final-rp2.pdf.

[8] https://www.fws.gov/midwest/endangered/insects/kbb/karnerbl.html (discussing habitat restoration projects for the butterfly).

the purpose of the ESA: conservation (including recovery) of threatened and endangered species.

E. A non-scientific definition of habitat would fail to implement Congress's mandate and would undermine the Endangered Species Act's effectiveness.

The text of the ESA commands agencies to "designate critical habitat. . . *on the basis of the best scientific data available* and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). While the critical habitat designation process involves consideration of economic factors, the statutorily-mandated process of identifying what habitat is essential is fundamentally science-based. Yet many arguments criticizing the efficacy of critical habitat designation appear "politically and economically driven." Hagen & Hodges, *supra*, at 400-401. Isolating the definition of critical habitat from underlying scientific principles, as Petitioner attempts to do, would undercut the science-based mandate of Congress, and cripple the ESA's ability to protect habitat and, consequently, to prevent species extinction.

A critical habitat designation is a determination that "the best scientific data available" support viewing that habitat as essential to the conservation of the species, and thus that its designation is necessary to fulfill Congress's goal to ensure the survival and recovery of a listed species. Where the Service has already used its discretion to determine, based on application of science, the need for habitat designation to support species conservation, courts should accord

deference to that science-based decision to designate the habitat as critical.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF SMALL BUSINESS OWNERS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curaie are small-business owners from widely varied industries. We are mural artists, farmers, ranchers, cheese-makers, and ecotourism entrepreneurs. Despite this diversity, we share common bonds: Each of us has a passion for our business, and an intimate familiarity with the provisions of the Endangered Species Act at issue in this case. From that common experience, we have drawn a common lesson: Environmental regulations like the ESA can provide economic benefits to business.

We write to make economic case for biodiversity and stewardship, and to protect Congress's broad grant of authority to the Fish & Wildlife Service to designate critical habitat for the protection of critically endangered species like the dusky gopher frog.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The challenge presented by Petitioner and its amici in this case follows a plot-line that is familiar to those who have been through past battles over species protection. Environmental regulation is portrayed as a "lopsided" zero-sum game where every marginal gain for species preservation produces "chilling" losses for business. Markle Resp. Br. 15; Br. of the Am. Farm Bureau Fed. *et al.* 3. Regulators like Fish & Wildlife Service are cast as

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[1] Petitioner and respondents have all lodged blanket consent letters with the court. No counsel for any party authored this brief in whole or in part, and no entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

thoroughgoing villains. They will, we are assured, be incentivized to pursue "'aggressive, tenuously based interference with property rights'" if the traditional understanding of the Service's authority to designate critical habitat is affirmed. Br. of Chamber of Commerce 15 (quoting Pet. App. 162a (Jones, J.)). We are likewise told that the Service will wield the consultation process needed to get a CWA permit—the only *conceivable* consequence of the designation at issue here—as a cudgel in a "regulatory shakedown," and will threaten to "prohibit all development" on Petitioner's property. Pet. Br. 44. And of course, "small businesses" are trotted out as the perpetual doe-eyed victims, Pet. Br. 16 n.10 (citing JA 28-31), forever subject to the whims of their regulatory oppressors, and fainting in the face even the most modest of species-preservation efforts.

Amici know every part of this caricature to be wrong. Amici fully understand that environmental regulations come with economic costs. But they also know that those regulations offer economic opportunities—often very great ones. Amici also know from personal experience that regulatory agencies are not entrenched opponents of business. More often they are valued partners, offering their considerable expertise to ensure that economic development and species preservation are pursued hand-in-hand.

The story told by Petitioner misses something even more fundamental too: All businesses, big and small, depend upon regulation to protect biodiversity, because biodiversity is economic bedrock. Every industry depends upon a biodiverse world to provide the insects that pollinate our food, the drugs to cure our diseases, and the trees we need to prevent catastrophic erosion, to provide

us with oxygen, and to scrub the atmosphere of excess carbon. We learn more every day about how every species loss chips away at that economic foundation—with each blow having the potential to produce catastrophic failures. Modest environmental regulation is thus essential to protect our entire economy from collapse.

Congress well understood this connection between the health of our ecology and that of the economy. That is why it took the long view with the Endangered Species Act, making species preservation, calculated according to an appropriately long timeline, an issue of the highest national importance. Congress recognized that when the habitat occupied by a species has proven inadequate to ensure its survival, the Service needs more flexibility, not less, in finding potential alternatives and designating them as critical habitat. The diverse challenges faced by critically threatened species require an equally diverse array of potential solutions, even if none is absolutely perfect. Congress also recognized that the long-term value of species cannot be captured on a simple balance sheet. For this reason, it put a hard stop on the ability of the Service to take economic considerations into account in making critical habitat designations when those economic considerations would threaten the ultimate survival of species. The Service stayed well within those well-marked boundaries in making the critical habitat designations at issue in this case, and the Court should not constrict them through the extratextual and unjustified judicial review that Petitioner seeks in this case.

ARGUMENT

I. Protecting endangered species provides significant economic benefits to small businesses.

Petitioner and its amici portray the interests of species preservation to be in perpetual conflict with the needs and desires of small businesses. But many of the owners of businesses actually impacted by environmental regulation like the ESA—especially the small businesses—have come to see that business and environmentalism can live in harmony. As amici's stories illustrate, this realization comes to different business owners in different ways. Some have discovered profitable business practices that stem directly from endangered species protection. Others have simply found profit in aligning the ESA's efforts at species conservation with their own beliefs about sustainability. Many rely on the continued availability of endangered species to sustain their businesses, whether to provide an attraction for tourists, a source of inspiration for great art, or simply to provide the undergirding for the entire economy. And most pragmatically of all, some have found that protection of species can protect the value of their property. Whatever their source, such epiphanies have caused business owners to conclude that biodiversity is good for business, and strong regulation is essential to protect biodiversity. And more are coming to that view all the time.

A. ESA regulations provide small-business opportunities.

A survey of executives from a variety of companies conducted by management consultants at McKinsey & Company in 2007 revealed a striking finding: 53% of those surveyed said their companies are taking action to

address today's biodiversity crisis.[2] This is because 59% of those surveyed have come to see biodiversity as more of a business opportunity than a public-relations risk. *Ibid.* This was a big change over the results from a similar survey conducted even three years before, in 2005, which found that only 29 percent saw business opportunities in climate change—an issue that occupied a similar position in the public debate at the time. *Ibid.*

Amici like Lance Kyle exemplify this shift. Lance owns Cascade Caverns, a caving attraction in the Texas Hill Country. A Central Texas Republican and a businessman all his life, Kyle never saw himself as an environmentalist. But he has come around to see the need for regulations like the ESA through his business. This is because Cascade Caverns boasts more than a spectacular network of caves. It also attracts abundant wildlife, including endangered species like the black-capped vireo, the golden-cheeked warbler, the cave ground beetle, and the Cascade Cavern Salamander—so called because it was discovered in one of the caves.

Kyle calls this threatened wildlife the "magic sauce" that makes his business successful. Online customer reviews frequently refer to the excitement of seeing the Cascade Cavern Salamander or other animals during their visits. And Kyle strongly believes that if those rare species were not protected under the ESA, they would no longer show up on his property, and neither would the customers that delight to see them.

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[2] McKinsey & Co., *The next environmental issue for business: McKinsey Global Survey Results* (Aug. 2010), <https://goo.gl/FZZbz6>.

Kyle has also found that the ESA protects more than the species themselves. He says the Act also protects the integrity of his property, helping him fend off harmful extraction or other development that would threaten his business. Accordingly, Kyle now finds himself a part of an ecotourism industry that not only supports those like Kyle that provide the attractions, but also sustains many other businesses such as hotels, clothing manufacturers, car rental companies, and restaurants.[3] That business is booming. According to the Service's 2016 survey, sportspersons spent $81 billion on hunting, fishing, and other activities during the year, while wildlife watchers spent another $75.9 billion.[4] That accounts for nearly one percent of the country's entire Gross Domestic Product, *ibid.*, and hundreds of thousands of good-paying jobs.[5] And as Kyle's experience shows, that industry depends upon the ESA.

The ecotourism industry is not the only one that depends upon the continued existence of endangered species. As amici illustrate, many artists and authors make

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[3] Population Reference Bureau, *Eco-Tourism: Encouraging Conversation or Adding to Exploitation* (Apr. 1, 2001), <https://goo.gl/Gtpo63>.

[4] U.S. Fish & Wildlife Service, *2016 National Survey of Fishing, Hunting and Wildlife-Associated Recreation* 5 (Apr. 2018), <https://goo.gl/9myL2U>.

[5] Defenders of Wildlife, *Economic Benefits of the ESA* 2 (*Economic Benefits of the ESA*), <https://goo.gl/UEsVJd> (noting that in 2006, wildlife watching accounted for more than 860,000 private-sector jobs).

protection of endangered species the very purpose of their business, and the source of their inspiration.

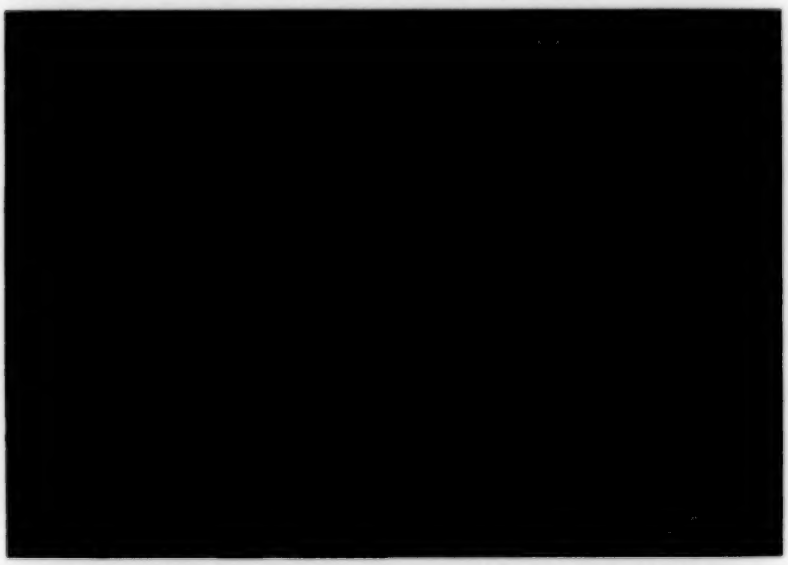
Susan Middleton is a wildlife photographer, author, and educator who has for many years made a living documenting the wonder of wildlife and endangered species. One of her recent books, *Archipelago*, co-authored by David Liittschwager, focused on the threatened marine creatures of the Northwestern Hawaiian Islands. One of her pictures of endangered species is included below. This bizarre, fragile creature is called a Blue Dragon Nudibranch:

Photo by D. Littschwager & S. Middleton ©2005.

Susan likes to focus on these smaller, lesser-known species to emphasize the essential role that even marginalized creatures play in ecosystems around the world. The power and emotional content of her work has made

it very popular, and it has also provided her a solid income, which she uses to fund other artistic projects and education efforts.

Jack Jeffrey of Hawaiian Birds, LLC also includes photography as part of his bird-watching business in Hawaii, which sees about 300 people a year. He estimates that 85 percent of his photography focuses on endangered species, like this Hawaiian Akepa, which is native to the last remaining old-growth forests on Hawaii Island.



Jack's photography also garners him a substantial living, which he uses to supplement his other income enough to bear the high cost of living in Hawaii.

Roger Peet is able to make a living through his talents painting murals. His work focuses on endangered and extinct species, such as this mural titled "Bear-

Shaped Hole"—painted on the side of a building located in the Laurel District of Oakland, California:

This painting depicts the California Grizzly Bear, an animal that figures prominently on the California State Flag, but tragically can no longer be found within in the state—a disturbing meditation on the profoundly felt effect of the animal's absence. Roger has similar projects all across the country, including in New York, Texas, Florida, and Arkansas.

Endangered species are also a source of inspiration for Rick Lamplugh, author of two best-selling books. The first, *In the Temple of Wolves: A Winter's Immersion in Wild Yellowstone*, focuses on the plight of the wolves that make Yellowstone home. The second, *Deep Into Yellowstone: A Year's Immersion in Grandeur and Controversy*, digs into other important controversies over protecting biodiversity and endangered species. So

deeply connected are Rick's writing career and his abiding respect for endangered species, especially wolves and grizzly bears, that he relocated from Oregon to Montana to be closer to the Greater Yellowstone Ecosystem. His deep connection to the natural world also motivated his appearance as an amicus in this case. Ever since *In the Temple of Wolves* reached the Amazon bestseller list, Rick has understood that he owes a debt to the wolves, and he wants to speak on the wolves' behalf—because they cannot speak for themselves.

For artists and authors like Susan, Jack, Roger and Rick, the ESA's protections for endangered species do more than secure the source of their lucrative businesses, they also protect the font of their inspiration and the pole that pulls their life's compass.

Other amici have obtained economic benefits even more closely tied to the ESA, because they flow directly from the ESA's environmental regulations.

Several amici have reported that the restrictions imposed by the ESA have protected their property by making it harder for neighboring properties to develop in ways that would harm their businesses. This includes Mary Falk of LoveTree Farmstead in Northern Wisconsin, whose symbolic commitment to sustainability is reflected in the farm's namesake symbol: two trees on the property that grew so closely together that their branches became intertwined over time. To Mary, these trees symbolize how agriculture and nature work together on her small farm, which devotes 100 acres to grazing lands for sheep, and another 100 acres to wildlife habitat.

The presence of protected birds on her property like bald eagles, osprey, and a blue heron rookery enabled the

farm to obtain status as a designated habitat, which allowed her community to fend off a proposed toxic ash dumb for chemical and medical waste that would have severely reduced her property's value and threatened the quality of the water she needs for her business.

In addition to obtaining advantages flowing from the ESA itself, Mary has realized that pursuing sustainability beyond what the law requires can also have remunerative benefits. She finds that her predator-friendly farming practices protect grazing grounds for her sheep, because the wolves she protects keep deer from overgrazing. And her efforts to reserve a wildlife corridor on the property—by restricting grazing to let her hayfields get older and thicker—have actually increased revenues on her cheese. Restricting grazing might reduce the volume of milk the farm gets from the sheep, but the practice increases the milk's complexity—because of the wider variety of wildlife, flowers, and insects that now leave their mark on the farm. Mary has found that the unique qualities of the sheep's milk allows the farm to sell higher-priced artisanal cheese. Together, these practices have allowed LoveTree Farmstead to survive even while many neighboring farms have closed. And thus while Mary cannot say the ESA has made her rich, it has allowed her to survive, raise three kids who still live in the community, and to enjoy the hunting, fishing, and recreational opportunities that come along with a healthy ecosystem.

Several other amici have taken part in programs maintained by the Service that turn environmental regulation into profitable enterprises. The Service and other agencies offer means by which business-owners can make money selling "mitigation credits"—arrangements under which one party agrees to permanently preserve

habitat for species to mitigate or offset losses to the species caused by another party's development.[6]

Dave Bugni created such a mitigation project on his small family forest in Oregon. Along with the forest's 85 acres of timberland, the property also has 0.8 miles of fish stream that is home to populations of threatened fish, such as coho salmon, winter steelhead, and cutthroat trout. His family undertook a stream restoration project on the property that aimed to improve fish passage by adding large woody debris structures, increasing the complexity of the creek, and thereby improving the habitat for the whole ecosystem. They also removed two large fish-blocking culverts beneath a nearby county road and replaced them with a new concrete bridge. Financing for these projects came from a variety of sources, including private grants as well as the blood and sweat of David's neighbors. But the bulk of the funding came from Portland General Electric, as mitigation for the relicensing for its hydropower plants. These habitat improvements not only made the stream habitable for the salmon, they also provided tangible benefits for the family's timber, by creating floodplains that retain water, thereby providing a buffer against drought.

The owners of the Connolly Ranch, located in California's San Joaquin and Alameda counties, have enjoyed the fruits of a similar arrangement with Safeway, Inc. The Ranch has been in the Connolly Family since 1872, and is now operated by Mark Connolly, Bridget Connolly,

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[6] U.S. Fish & Wildlife Service, *Working Together: Tools for Helping Imperiled Wildlife on Private Lands* 10 (2015) (*Imperiled Wildlife*), <https://goo.gl/q1PtUc>.

Katherine Connolly, and Celeste Garamendi. In 1991, the Ranch created a conservation easement on the property to protect the San Joaquin kit fox. That easement was purchased by Safeway to mitigate impacts from its construction of a new distribution center in the San Francisco Bay Area. In a win for all involved, the fox received permanent habitat protection on approximately 1,500 acres of the Ranch, Safeway was able to build its new distribution center, and the Ranch was able to pay off a great deal of accumulated debt on the property—debt that otherwise would have forced the Connolly family to sell off portions off the Ranch. The easement's modest restrictions allow the Connolly family to continue their profitable grazing and ranching operations on the property, just as they have done for the past 150 years. This positive experience with the ESA has led the Ranch to enter into other agreements to create preserves for other endangered species, such as the California tiger salamander and the California red-legged frog.

Ray McCormick is a soybean and corn farmer in Indiana and Illinois, who has done mitigation work with Duke Energy and other businesses to protect endangered species such as whooping cranes. He has also received direct subsidies under the ESA to build habitat for the Interior Least Tern. These efforts have allowed him to maintain a profitable farm alongside the migratory birds and other endangered species he is able to protect. He considers it a badge of honor to have protected endangered species on his property—a testament both to the value of his property and his concern for the diversity of life.

The credits obtained under these programs can be extremely valuable. Individual credits have been known

to trade at $100,000 or more. *Imperiled Wildlife*, *supra* note 6, at 11. And the global trade in such credits is expected to reach $10 billion a year by 2020.[7]

Other business owners have been able to parlay protection of endangered species into other kinds of economic opportunities. Indeed, while Petitioner has seen the humble dusky gopher frog as nothing but a hinderance to its business—slight and speculative as it might be—others have seen only opportunity. Take the creators of Tradition, a 4,800-acre planned community near the De Soto National Forest, near Biloxi Mississippi.[8] When they learned that part of their property was adjacent to Glen's Pond—the location of the gopher frog's last known population—would be within the critical habitat that the Service designated for the frog, 66 Fed. Reg. 62,993, 62,994-95 (Dec. 4, 2001), they did not file a lawsuit. AR4574, 4582. Instead, they supported the critical habitat designation, despite the fact that there were no reported sightings of the frog or evidence of its migration onto the property.[9] Tradition then voluntarily created a "tempo-

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[7] TEEB for Business, *The Economics of Ecosystems and Biodiversity* 5:26 (2010) (*The Economics of Ecosystems*), <https://goo.gl/UcBxZ2>.

[8] Tradition Homes Website, http://traditionms.com/.

[9] See *Columbus Communities, L.L.C.-Tradition Properties, Inc. Comments on Proposed Rule to Designate Critical Habitat for the Mississippi Gopher Frog* 2 (July 30, 2010) (noting that "there have been no reported sightings or evidence of migration of the Mississippi gopher frog into our community," yet "[w]e support the USFWS designation of critical habitat for the Mississippi gopher frog as proposed.").

rary no-development zone" adjacent to the pond where the critical habitat could be found, *id.* at 2. and then sold the land at market price to a land trust that would protect land surrounding the frog's breeding ground from development.[10] That allowed Tradition to make money selling valuable land for conservation purposes while maintaining the conservationist ethos it has used to market the property to buyers. And in doing so, Tradition proved Petitioner's dire forecasts about property-devaluing effects of critical habitat designation to be unfounded. Tradition is doing exactly the kind of residential development that Petitioner complains it might be prohibited from doing. And Tradition has not only found such development to be environmentally feasible, but profitable.

Still others, like amicus Jeff Alvarez, derive significant income from selling services that are necessary for species preservation. Jeff is a biological consultant who facilitates projects that might implicate the ESA. He also trains biologists all over the West on how to work with endangered species. Jeff and the other amici thus show in myriad ways that the modest costs imposed through the ESA's environmental regulations are frequently outweighed by the benefits of those regulations—including for those that bear the full weight of their regulatory impact. That belies the zero-sum picture being painted by the Petitioner and its amici.

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[10] Press Release, Center for Biological Diversity, *Conservation Groups, Developer Sign Agreement to Protect Endangered Mississippi Gopher Frog* (Mar. 8, 2012), <https://goo.gl/Cb8XkY>.

B. The Service's experts are an economic asset for many small-businesses.

Amici's experience also challenges another article of faith asserted by Petitioner and its amici: that the Service is staffed by zealots who will advance natural interests above human ones, whatever the costs, and are sure to prohibit any future development of the property given the chance. Pet. Br. 14. Respondent Center for Biological Diversity has already shown through empirical research that such distrust is wildly unjustified, because the outright development bans Petitioner fears "essentially never happen, and ... even substantial restrictions are a vanishingly rare exception." Ctr. for Bio. Diversity Resp. Br. 20 (citing Jacob Malcolm & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, 112 Proc. Nat. Acad. Sci. 15844, 15846 (2015)). To this data-based analysis, amici add their personal experience, which confirms the experts of the Service to be an asset, not a liability, to business owners—nothing like the obstructionist force portrayed by the Petitioner.

The ease of working with the Service was a great boon—and a complete shock—to Franziska "Francis" Schrabram, the owner of Rana Ranch in Calvares County, California. When an endangered California red-legged frog was discovered in 2006 by one of her neighbors, the discovery created an uproar in her conservative ranching community. Francis heard stories from neighbors that the Government would take her land and prevent her from ranching. Thus, when it came time to deal with Service officials, Francis was deeply concerned. But what she found upon engaging with the Service bore no resemblance to her neighbors' dire predictions. Her work

with the Service proved to be a very fruitful cooperation. Service officials made funding available under the ESA that allowed her to take on substantial projects she would not have been able to undertake on her own, including building fences, digging new wells, and habitat restoration. Now Rana Ranch has a conservation easement that, together with other improvements, has actually increased the ranch's profitability, while doing nothing to prevent ranching activities even on the portion of the ranch to which it applies. Francis has found the easement's rules to be so easy to understand and so manageable to follow that she plans to expand the conservation easement to the entire property. Her experience has even brought her neighbors around—one erstwhile skeptic applied for funding for his own conservation projects.

Susan Sorrels had a similarly positive experience with the Service when she sought to reintroduce the Amargosa vole on her property through her business: Shoshone Village, a tiny natural and historical attraction in the Mojave desert that abuts an incredible desert oasis with an enormous wetland. Susan participated in a Section 6 project under the Endangered Species Act with the Service and the California Department of Fish and Wildlife. She found that the state and federal officials she worked with were very protective of her interests, despite her eagerness to move the project along quickly to help the species. And the results of this collaboration speak for themselves. With the Service's expert guidance, the oasis has been significantly improved, the vole has been successfully reintroduced from a neighboring population, and Ms. Sorrels reports that her income has increased. Hers is now the most stable business in the area, and she is urging others to shift from mining to eco-

tourism to create a more sustainable economic base for the region.

Brett Baker found the collaboration he enjoyed with state and federal officials to be the most important part of his experiences with the ESA. Brett has encountered issues arising under the ESA multiple times over the communal levy system which serves his family's farm, and over the elderberry bushes on the farm that Service officials asked him to preserve for the Valley elderberry longhorn beetle. Brett even found the process inspirational, noting that while "Yes there are costs" posed by the Act's required consultations and other regulatory requirements, he found they were more than made up for through the benefits they provide to future generations. So positive was his experience that he could only conclude that, like him, "deep down, all farmers are environmentalists."

Finally, Mike Phillips of the Turner Endangered Species Fund, which works to preserve endangered species on private land, has noted that the flexible nature of the ESA's species protections makes it easy to work with Service officials. In Phillips' experience, the ESA can be—and is—administered in a way that protects business' profitability while still improving habitat and other protections for endangered species. This is because federal officials recognize there are lots of workarounds for economic conflicts, even if there are no workarounds for extinction. Because the officials of the Service put that idea into practice, amici have found that they are an asset that tilts the balance sheet further in favor of biodiversity regulation. Yet again, the horrors of Petitioner's imaginings are dispelled by amici's actual experiences.

C. Protection of biodiversity is also essential for the economy as a whole.

Petitioner and its amici miss something else with their complaints about the difficulty in quantifying immediate "monetary benefits from the designation" of the gopher frog's critical habitat. Pet. Br. 17. Many of the economic benefits of such efforts are much broader in scope than can be identified on a single business's balance sheet, and can only be measured by observing larger economic forces that take time to reveal themselves. Yet when they do, they prove to be extraordinarily powerful, creating virtuous cycles that positively impact the economies of entire regions—indeed, entire countries.

A perfect example of this phenomenon is the Yellowstone Valley, where protection of the integrity of the Greater Yellowstone Ecosystem is not merely good ecology, but has proven "a crucial element in any economic development strategy for the region." Thomas Michael Power, *Ecosystem Preservation and the Economy in the Greater Yellowstone Area*, 5 Conserv. Bio. No. 3 at 395 (Sept. 1991) (*Ecosystem Preservation*). When wolves were returned to the Yellowstone National Park, for instance, it produced effects that lifted the region's entire economy. The wolves attracted more visitors to the park, bringing in an additional $35 million in tourist revenue—double that once the money filtered through the local economy. John Duffield et al., *Wolves and People in Yellowstone: Impacts on the Regional Economy* 6 (Univ. of Montana Working Paper Sept. 2006), <https://goo.gl/B4ErY6>. And economists observed that such efforts to make the area more environmentally attractive have produced feedback effects that made economic conditions even more favorable. People greatly

value higher-quality living environments, and will make "major commitments of resources," and will endure "significant sacrifices in terms of potential money income and the range of commercial opportunities" in order to enjoy them. *Ecosystem Preservation* 396. When people relocate to pursue high-quality environments, it creates "an available supply of labor at relatively low cost." Thomas Michael Power, *Lost Landscapes and Failed Economies* 16 (1996). Once introduced into the system, this enhanced regional labor pool stimulates economic activity and injects further capital into the local economy. *Ibid.*

The ESA's regulatory protections do more than provide economic opportunity, however. They also stave off economic collapse. This is because the cornerstones of the world's economy all rest on a living fabric of interconnected organisms. Biodiversity contributes over $190 billion annually in insect pollinators necessary to sustain agriculture. *The Economics of Ecosystems*, *supra* note 7, at 2:16. And between 25 and 50 percent of the $825 billion pharmaceutical market is derived from biologically supplied sources. *Id.* at 5:13. From cancer treatments that come from yew trees and periwinkle flowers, to diabetes therapies obtained from Gila monsters, many of our life-sustaining advances come from, and depend on, the availability of natural sources. *Economic Benefits of the ESA*, *supra* note 5, at 2.

And biodiversity does even more. It contributes positively in innumerous ways to human physical and mental health, provides erosion control, carbon storage, and sequestration, and provides resilience to large-scale disturbance and environmental change. *The Economics of Ecosystems*, *supra* note 7, at 2:6, 6:8, Annex 2.1; *Economic Benefits of the ESA*, *supra* note 5, at 2.

The sheer tonnage of economic value the nation receives from assets traceable to a biodiverse world is staggering. "The economic value of terrestrial nature's contributions to people in the Americas is estimated to be at least $24.3 trillion per year."[11] That equals the Americas' gross domestic product. *Ibid.*

The interdependent nature of our biodiverse world means that each part of the ecosystem—even the humble dusky gopher frog—contributes to those baseline economic needs. Each loss of an endangered species is thus an irreplaceable blow to the balance in our collective resource bank. And species-loss can be more than simply a gradual depletion of the account. It can also result in a catastrophic run on the bank.

For instance, during China's rapid economic expansion from 1949-1981, China significantly depleted its natural forests in order to meet voracious timber demand. This rapid deforestation reduced timber stocks, tilted forests toward younger, weaker trees, and compromised soil conservation and watershed protection. *The Economics of Ecosystems supra*, note 7, at 2:20. Things reached a tipping point in 1997, when severe droughts caused the lower reaches of the Yellow River to dry up for 267 days. A year later, that drought gave gave way to major flash flooding. *Ibid.* The result was $30 billion in damages, the loss of 4,150 human lives, and the displacement of millions of people. *Id.* at 220, Annex 2.1. The lesson from this episode is simple: Petitioner can complain

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[11] IPBES, *The Regional Assessment Report on Biodiversity and Ecosystem Services for the Americas: Summary for Policymakers* 10 (2018), <https://goo.gl/Lyo6FV>.

all it wants about the difficulty of quantifying distinct benefits of species conservation. But it cannot ignore that the failure to protect species is a sure path toward a catastrophic destruction.

II. The Service's broad, flexible authority to designate potentially habitable land as critical habitat is essential to protect endangered species.

Congress recognized this intertwining between our fate and that of our natural world when it crafted the ESA's provisions for designating critical habitat in 16 U.S.C. §§ 1532(5)(A), (B) and 1533(a)(3)(A)(i). In those provisions, Congress required species loss to be combatted "whatever the cost," *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 184 (1978). This is because each species' contributions to the world—from its innate existence appreciated only by nature-lovers, to the economic contributions as "potential resources" that even hard-nosed capitalists can understand, Report of the Committee on Merchant Marine and Fisheries, H.R. Rep. No. 93–412, pp. 4–5 (1973)—have "'incalculable' value." 437 U.S. at 188-89, quoting H.R.Rep.No.93–412, pp. 4–5 (1973)).

Congress likewise recognized that the worse the plight of the threatened species, the greater flexibility the Service would need to thwart its extinction. That is why flexibility is written into the designation process. Congress gave the Service the option to go beyond areas actually occupied by the endangered species in designating its critical habitat. Under Section 3(5)(A)(ii), critical habitat can extend into areas "outside the geographical area occupied by the species," because the occupied areas might be so compromised, small, or isolated that they will not support recovery by themselves. The need for flexibility to conserve species also motivated Congress to

strip Section 3(5)(A)(ii) of many of the conditions required for a designation of occupied habitat under Section 3(5)(A)(i), which is restricted to areas that contain the "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). Those provisions are conspicuously missing from Section 3(5)(A)(ii), and their absence is no accident. Removing these restrictions empowered the Service to consider a broader range of options for potential habitat to designate, to maintain the flexibility necessary to combat the limitless variety of extinction threats that might exist, whatever their source. The validity of designations under Section 3(5)(A)(ii) are thus subject to only a single, overriding requirement: whether they "are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Species conservation is thus all that really matters.

Congress similarly put species-survival first in the restrictions it placed on the Service's authority to *exclude* areas from critical habitat—putting a hard stop on consideration of any "economic impact" of designation if "the failure to designate critical habitat will result in extinction of the species concerned." 16 U.S.C. § 1533(b)(2). That blocks the Service from prioritizing *anything* else—such as the economic burdens of the regulation—if doing so would lead to species extinction. Congress recognized that anything less would allow the paramount economic benefits of the species to be irretrievably lost.

There is no real question that the Service stayed within the broad boundaries of its designation authority here, because the designation of Unit 1 meets the only standard required under the ESA: It is "essential for the

conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service determined, in consultation with a panel of scientists, that focusing solely on the frog's current habitat would not adequately protect against extinction. Ctr. For Bio. Diversity Resp. Br. 9-10. That is because relegating the dusky gopher frog's protected critical habitat to the single area of Southwest Mississippi where it is presently found would leave the frogs vulnerable to threats—from invasive species, drought, and disease—that could wipe out the entire species with a single blow, and are "likely to occur at the same time at sites near each other." J.A. 52-53, 125.

That unacceptable risk made designation of *some* unoccupied land "essential to conserve the species" under Section 3(5)(A)(ii). The Service could not simply do nothing. So the Service picked Unit 1 because it was the best available option—even if it was not a perfect option. Ctr. for Bio. Diversity Resp. Br. Resp. Br. 11. The destruction of the frog's habitat through urbanization, flood control, agriculture, and timber foresting left very few options available. *Id.* at 8.

Tellingly, Petitioner does not quarrel with any of the scientific judgments that went into the designation of Unit 1. Nor does it contest that the frog cannot survive in its current habitat. Instead, it simply suggests that we must accept the species' extinction for its own economic expediency—and it arrives at that conclusion through a combination of reading provisions into the statute that Congress specifically stripped out, and by implying a requirement that courts engage in exactly the types of explicit cost-benefit calculus that Congress explicitly forbade the agency from doing. But as the Center for Biological Diversity has already explained, Congress did not

permit endangered species to be traded away so easily. And the significant economic benefits that could be earned in spite of—or because of—the modest restrictions the Service imposed, as well as the need to protect biodiversity to ensure our long-term survival, require that Petitioner's reading be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 6, 2018

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Appendix..... 1a

APPENDIX

Turner Endangered Species Fund – The Turner Endangered Species Fund was founded by Ted Turner and Mike Phillips, currently a Montana state legislator. The Fund works on restoring individual species as well as functional ecosystems on private land.

Jeff Alvarez – Jeff Alvarez is a biological consultant who provides services for companies seeking approval for projects which would affect endangered species and their habitat.

Brett Baker – Brett Baker is a sixth-generation farmer in California who sees protection of endangered species as a component of protecting the water supply which is the lifeblood of his family farm.

David Bugni – David Bugni and his family own a private forest in Oregon that utilizes sustainable forestry techniques and has carried out stream restoration projects on their property to help endangered salmon species as well as their forest.

Cascade Caverns – This small business is owned by Lance Kyle. The business operates cave tours in the Texas Hill Country and relies significantly on several endangered species found in the caves and on the surrounding private property.

Connolly Ranch – Connolly Ranch is a family ranch in California that has protected habitat for endangered species while operating a profitable ranching business.

Hawaiian Birds, LLC – This small business is owned and operated by Jack Jeffrey. Hawaiian Birds, LLC operates bird watching tours and sells photographs of Hawaiian wildlife, including several endangered species.

Rick Lamplugh – Rick Lamplugh is a best-selling and award-winning author who lives in Gardiner, Montana, in order to be close to the endangered species that inspire his work, such as grizzly bears and wolves.

LoveTree Farmstead – LoveTree Farmstead in Northern Wisconsin is a sheep dairy farm and maker of artisanal cheeses, operated by Mary Falk and her family.

Ray McCormick – Ray McCormick is a soybean and corn farmer in Indiana and Illinois who operates his profitable farm alongside migratory birds and other endangered species.

Susan Middleton – Susan Middleton is a wildlife photographer, author, and educator who focuses on wildlife issues, including endangered species.

Roger Peet – Roger Peet is an artist who creates murals around the country, many focusing on themes of endangered species and their protection.

Rana Ranch – Rana Ranch is a cattle ranch in Calaveras County, California that is operated by Franziska Schabram. Rana Ranch worked with state and federal officials to protect habitat for an endangered species while still operating a profitable cattle ranch on land subject to a conservation easement.

Shoshone Village – Shoshone Village is a tourist operation in the Mojave Valley of California owned by Susan Sorrels. The property includes a desert oasis that is being rehabilitated to be habitat for endangered species

but which also is a magnet for tourists to the area.

No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND
WILDLIFE SERVICE, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(1) Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation; and

(2) Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1976, Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated, both in and out of the courtroom, for the protection of private property interests from unconstitutional takings. This aspect of its advocacy is reflected in regular representation of property owners challenging overreaching governmental actions in violation of their property rights. Additionally, SLF frequently files *amicus curiae* briefs at both the state and federal level in support of property owners. *See Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Council*, 505 U.S. 1003 (1992); and *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

This case is of particular interest to SLF because the Fifth Circuit's holding that the U.S. Fish and Wildlife Service's (Service) decision to not exclude Petitioner's land from critical habitat violates this Court's precedent, disregards the presumption of

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[1] All parties have consented to the filing of this brief by blanket consent or individual letter. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

reviewability, and as Judge Jones explained for the six member dissent from the denial of rehearing en banc, represents an "abdication" of the judiciary's responsibility to oversee agency action in accordance with the Administrative Procedure Act. *Markle Interests L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 654 (5th Cir. 2017) (Jones, J., dissenting). The "ramifications" of the panel majority's decision for, among other things, "judicial review of agency action cannot be underestimated." *Id.* at 637.

SLF agrees with that assessment. Over the last decade, the administrative state has grown in two primary ways – through the launching of new agencies and through the growing deference the judiciary affords agency actions. While both means of growth offend the founding principles of limited government and enumerated powers, the latter is of prime concern because expansion of administrative deference raises serious constitutional concerns. SLF writes to explain how the panel majority's view that the Service's decision to not exclude Petitioner's property from critical habitat is unreviewable is simply wrong.

SUMMARY OF ARGUMENT

"The availability of judicial review, is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally void." Louis L. Jaffe, *Judicial Control of Administrative Action* 320 (Little, Brown

1965). The common law presumption of reviewability grew out of the constitutionally protected right to claim protection of the laws. *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (citing *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835)). Congress codified the presumption of reviewability when it enacted the Administrative Procedure Act (APA). 5 U.S.C. § 701 *et seq*. This Court has "long applied . . . [a] strong presumption favoring judicial review of administrative action." *Mach Mining v. EEOC*, 135 S. Ct. 1645, 1653 (2015).

Two decades ago, this Court addressed that presumption in a case with striking similarity to the cases before the Court today, and held that the Service's determination to not exclude property from the critical habitat of two endangered fish was judicially reviewable. *Bennett v. Spear*, 520 U.S. 154, 172 (1997). More specifically, this Court held that the issue of whether the Service followed proper procedure and considered the economic impact of its decision to not exclude, or rather to include, property as critical habitat was judicially reviewable. *Id*.

Ignoring the presumption of reviewability, this Court's precedent, and basic separation of powers principles, the Fifth Circuit abdicated its responsibility to review the Service's consideration, or rather lack of consideration, of the economic impact of its decision to not exclude Petitioner's property from critical habitat. Reviewing executive branch actions is one of the most important roles the judiciary plays in our society. As Justice Kagan recently explained in her opinion for a

unanimous Court, this Court is reluctant to see an agency's compliance with the law rest in its hands alone because "[w]e need only know – and know that Congress knows – that legal lapses and violations occur, and especially so when they have no consequence." *Mach Mining*, 135 S. Ct. at 1652-53.

The implications of the Service's decisions to include or exclude property from critical habitats cannot be understated. The Service's argument that a court cannot review such decisions indicates a belief that it is above the law and that the judiciary lacks the power to hold it accountable and review whether it followed legislatively mandated procedures. And, in what can only be described as an abdication of responsibility, over a dissent and a six member dissent from the denial of rehearing en banc, the Fifth Circuit deferred to the Service.

ARGUMENT

I. A strong presumption of reviewability supports judicial review of habitat exclusion decisions.

A. Judicial review of the Service's decision not to exclude an area from critical habitat is presumed.

1. This Court's precedent antedating the APA supports judicial review of executive action. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall declared, "The very essence of civil liberty

certainly consists in the right of every individual to claim the protection of the laws." *Id.* at 163. Inherent in the constitutionally protected right to claim protection of the laws is a strong presumption of judicial review. *See Bowen*, 476 U.S. at 670 (citing *Nourse*, 34 U.S. (9 Pet.) at 28-29).

Throughout history, the Court has emphasized the need for judicial review of executive actions. And, despite a period of judicial restraint that resulted only out of deference to Congress, by the early 20th century, any perceived barriers to judicial review faded away. *See Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) (explaining that the acts of all administrative agency "officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief"). The increased level of executive actions and the already growing administrative state underscored the need for judicial review. In 1915, the Court reaffirmed the common law presumption of reviewability when it reviewed the Acting Commissioner of Immigration's detention of a group of aliens for the purpose of deportation even though the statute at issue did not provide for judicial review. *Gegiow v. Uhl*, 239 U.S. 3, 8 (1915). Writing for the Court, Justice Oliver Wendell Holmes explained that judicial review was appropriate because the statute did not forbid courts from considering whether the Commissioner's act violated the statute. *Id.* at 9. In doing so, Justice Holmes made clear that under the common law, unless a

statute forbids judicial review, the courts have both the power and duty to review challenged executive actions.

Over the next few decades, the Court continued to stress the need for judicial review of administrative decisions. By way of example, in *Lane v. Hoglund*, 244 U.S. 174 (1917), the Court reviewed the actions of the Secretary of Interior taken under a homestead law. In doing so, the Court found judicial review of administrative acts both appropriate and necessary, explaining that to find otherwise would "limit[ ] the powers of the court" and "be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties." *Id.* at 182. And, in *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932), the Court reviewed the Secretary of Labor's imposition of fines against steamship companies for bringing aliens with illnesses into the United States. The Court explained that it had the power to review the administrative action because even though "Congress confer[red] on the Secretary great power, . . . it is not wholly uncontrolled." *Id.* at 339.

In 1944, the "powers of the court" to review executive actions that the Court so often spoke about received their greatest affirmation and explanation. In *Stark v. Wickard*, 321 U.S. 288 (1944), the Court explained that the presumption of reviewability arises from Article III of the United States Constitution because "[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Id.*

at 310. The Court continued: "[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Id.* Starting with the presumption of reviewability inherent in the Constitution, the Court reviewed the statute governing the Secretary of Agriculture's actions and, finding it silent as to judicial review, explained that "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Id.* at 309.

2. In 1946, Congress enacted the Administrative Procedure Act and codified "the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702). When determining whether critical habitat designations are subject to judicial review, the Court demands that the APA's "generous review provisions . . . be given a hospitable interpretation." *Id.* at 141 (internal quotations and citations omitted). Both the Court and Congress have emphasized that "'[v]ery rarely do statutes withhold judicial review[ ]'" because to do so would convert statutes into "blank checks drawn to the credit of some administrative officer or board." *Bowen*, 476 U.S. at 671

(quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

B. Congress did not preclude judicial review of the Service's decision to not exclude an area from critical habitat.

This Court's precedent establishes "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen*, 476 U.S. at 670 (quoting *Abbott Labs.*, 387 U.S. at 140). "[S]tatutory preclusion of judicial review must be demonstrated clearly and convincingly." *Nat'l Labor Relations Bd. v. United Food & Commercial Workers Union*, 484 U.S. 112, 131 (1987). Although this Court does not apply the "clear and convincing evidence standard" in a strictly evidentiary sense, "the standard serves as 'a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.'" *Bowen*, 476 U.S. at 672 n.3 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350-51 (1984)).

Various considerations inform the Court's analysis of whether Congress intended to foreclose a given avenue of judicial review, including the nature of the administrative action, and the statute's language, structure, objectives and legislative history. *See Block*, 467 U.S. at 349; *see also Bowen*, 476 U.S. at 673. The leading consideration in determining whether

Congress precluded judicial review is whether a party can obtain meaningful judicial review of the agency action at issue if review under the APA is precluded. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000).

Notably, the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* is devoid of any explicit prohibitions on judicial review of the Service's decision to not exclude land from critical habitat. "[S]ilence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts." *Stark*, 321 U.S. at 309; *see also Dunlop v. Bachowski*, 421 U.S. 560, 566-67 (1975); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970). Because the plain words of the ESA lack an express prohibition against judicial review, the Service "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit . . . judicial review of [its] decision." *Dunlop*, 421 U.S. at 567. The presumption of reviewability demands that "[t]he question is phrased in terms of 'prohibition' rather than 'authorization[.]'" *Id.* (quoting *Abbott Labs.*, 387 U.S. at 140). "[O]nly upon a showing of 'clear and convincing evidence' of contrary legislative intent should the courts restrict access to judicial review." *Id.* (quoting *Abbott Labs.*, 387 U.S. at 141).

Turning to the remaining factors the Court considers, the Service offers no evidence that the ESA's legislative history supports preclusion. *Bowen*, 476 U.S. at

673 (noting that the court will consider "specific legislative history that is a reliable indicator of congressional intent"). That is because the ESA's legislative history contains no specific statement supporting preclusion of judicial review under the APA of the Service's decision not to exclude land from critical habitat designations. Rather, judicial review is consistent with the purpose of the ESA which is to, among other things, "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved[.]" 16 U.S.C. § 1531(b). Judicial review of the Service's decision to not exclude land.

Finally, denying judicial review of the Service's decision to not exclude Unit 1 leaves Petitioner with no means of obtaining meaningful judicial review. On several occasions, this Court explained that Congress does not intend to foreclose meaningful judicial review which would deny due process. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97 (1991); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150-51 (2010). The Fifth Circuit's holding denying judicial review gives the Service unfettered authority to not exclude land from habitat designations, because such decisions are now completely unreviewable. Absent clear and convincing evidence of congressional intent, the Court has never precluded review of statutorily required procedures.

II. The Fifth Circuit's denial of judicial review conflicts with *Bennett v. Spear*.

The Fifth Circuit dismissed basic tenets of administrative law and this Court's precedent when it refused to review the Service's decision to not exclude Unit 1 from designation as critical habitat. As this Court explained two decades ago when it found the Service's decision to not exclude land as critical habitat reviewable: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett*, 520 U.S. at 172 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943)).

Like the Service does here, in *Bennett*, the Service sought to avoid judicial review of the critical habitat designation at issue. *Id.* More specifically the Service contended that the Secretary's duty under 16 U.S.C. § 1533(b)(2) to "tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat" was discretionary and hence, unreviewable. *Id.* This Court rejected that argument, explaining that while the Service's ultimate decision regarding critical habitat designation "is reviewable only for abuse of discretion" the "categorical *requirement*" that the Service consider the economic impact of such a designation remains and as such, is reviewable.[2] *Id.* As Judge Jones noted in

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[2] The Endangered Species Act (ESA) plainly requires the Secretary to consider the economic impact of the agency's actions. In pertinent part, 16 U.S.C. § 1533(b)(2) provides that, when designating critical habitat, the Secretary "shall" make any decision

writing for the dissent, *Bennett* is a "clear signal that the Service's decision is reviewable." *Markle Interests*, 848 F.3d at 654.

Further, the panel majority's reliance on *Heckler v. Chaney*, 470 U.S. 821 (1985), was misplaced. While this Court held that the claim before it was not reviewable because it raised a question "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the nature of the agency action involved there is entirely different from the agency action involved in this case. It explained that "an agency's decision not to take enforcement action should be presumed immune from judicial review" because it has traditionally been "committed to agency discretion. . . ." *Heckler*, 470 U.S. at 832.

Moreover, this Court observed that:

> [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

"on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." *Id.* In addition, it states that the Secretary "may exclude any area from critical habitat" when extinction of the species is not in issue by finding that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.*

Id. Here, as is plain, the Service exercised its powers over Petitioner's property. That affirmative exercise, whether denominated an inclusion or the refusal to exclude, is an affirmative action that is reviewable for an abuse of discretion.

This case provides the Court with an opportunity to affirm its rejection of the Service's request to exempt its discretionary acts from the "required procedures of decisionmaking." *Bennett*, 520 U.S. at 172 (citing *Chenery Corp.*, 318 U.S. at 94-95).

III. Denying judicial review of habitat exclusion decisions violates separation of powers principles.

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund*, 130 S. Ct. 3138). "[T]he authority administrative agencies now hold over our economic, social, and political activities," *id.* at 1878, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace,

negotiation, and foreign commerce. . . ." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (citation and quotation omitted).

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Members of the Supreme Court warned that the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id.* at 594 (Frankfurter, J., concurring). The purpose of the separation of powers is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id.* at 629. As Justice Jackson stressed, any presidential claim to power "at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution." *Id.* at 638 (Jackson, J., concurring).

Under these principles, any action by which one branch of the federal government presumes to encroach upon the constitutionally assigned functions of

another branch presents a fundamental threat to liberty. "In a government, where the liberties of the people are to be preserved . . . , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787, p.108 (rev. ed. 1966). *See* The Federalist Nos. 47-51 (James Madison) (explaining and defending the Constitution's structural design of separated powers). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). See *id.* at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

Preclusion not only conflicts with the presumption of reviewability founded in common law and codified in the APA, but it runs afoul of the Constitution. As this Court has explained "a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse" than a judiciary that reviewed agency action. *Free Enter. Fund*, 130 S. Ct. at 3157 (internal quotation marks, alterations, and citations omitted). "The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) (majority opinion).

There are few actions by administrative agencies that exhibit the tyranny our Founding Fathers feared more than decisions by the Service not to exclude, or rather to include, land as critical habitat under the ESA. Congress could have never predicted the vast expansion of critical habitat and the egregious violations of the Fifth Amendment that the Service has pursued since it enacted the ESA in 1973. The Service's latest attempt to expand critical habitat for the dusky gopher frog to include Unit 1, land owned by private parties which the Service itself admits is neither a current habitat or even a suitable habitat for the frog, underscores the need for judicial review.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, *amicus* respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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No. 17-71

In The

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF ST. TAMMANY PARISH GOVERNMENT AS AMICUS CURIAE SUPPORTING WEYERHAEUSER PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

This matter comes before this Honorable Court on the granting of a writ application involving Weyerhaeuser Company, *Petitioner*, Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and United States Fish and Wildlife Service, *et al.*, *Respondents*, and Center for Biological Diversity and Gulf Restoration Network, *Intervenor-Respondents*.

The *amicus* brief in support of the writ application was filed on behalf of St. Tammany Parish Government, a local political subdivision of the State of Louisiana, governed by a Home Rule Charter form of government as authorized by Article VI of the Louisiana Constitution of 1974.

St. Tammany Parish Government has exclusive zoning jurisdiction over the subject property in this litigation, which has been designated for development as a Traditional Neighborhood Development. Adversely, the United States Fish and Wildlife Service subsequently declared the subject property as "Critical Habitat" for the gopher frog. Said declaration, if permitted to remain, will economically damage St. Tammany Parish Government and jeopardize the health, safety, and welfare of its citizens.

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[1] This brief has been authored solely by counsel for St. Tammany Parish Government and its undersigned counsel of record. No party contributed funding related to the preparation of this brief.

SUMMARY OF ARGUMENT

The underlying facts briefly stated place the federal government's authority vested in the United States Fish and Wildlife Service against that of not only private landowners but, more importantly, St. Tammany Parish Government's authority to protect the health, safety, and welfare of its citizens through its inherent local zoning authority. This is especially true when said action by the federal agency amounts to an unreasonable usurping of local authority which jeopardizes the economic development of the Parish and threatens its residents by requiring burnings to recreate a longleaf pine savanna forest in order to maintain the one thousand five hundred forty-four (1,544) acre site as a potential habitat for the gopher frog.

ARGUMENT

A. Zoning In St. Tammany Parish

St. Tammany Parish has a long and distinguished history of zoning with conservation and preservation inherent in its Code of Ordinances.

St. Tammany Parish Government's zoning authority dates back to the 1921 Louisiana State Constitution, and is the third (3rd) oldest governmental entity in the State of Louisiana to adopt zoning ordinances.

After a three (3) year process of planning and extensive public involvement, Ordinance Council Series

No. 10-2408 was adopted on December 2, 2010, which completed the comprehensive rezoning of the unincorporated areas of the Parish. The property that is the subject of the "critical habitat" designation by the U.S. Fish and Wildlife Service and which forms the basis of this litigation was included in said process and was zoned to be developed as a Traditional Neighborhood Development-2 (TND-2).

The purpose of the TND-2 designation is clearly stated in the ordinance:

> Section 5.3501A PURPOSE
>
> > The purpose of a TND-2 Traditional Neighborhood Development Zoning District ("TND District") is to encourage mixed-use, compact Development and facilitate the efficient use of services. A TND District diversifies and integrates land uses within close proximity to each other, and it provides for the daily recreational and shopping needs of the residents. A TND District is a sustainable, long-term community that provides economic opportunity and environmental and social equity for the residents. This ordinance's intent is to encourage its use by providing incentives, rather than prohibiting conventional Development.

The location of the property was a major factor in the zoning process for its being located north of U.S. Interstate 12 (I-12). Said location of a traditional neighborhood removed its future residents and businesses out

of harm's way in the inevitable event of the devastating effects from hurricanes and flooding.

Its history of preservation and conservation includes its support of the creation and zoning of the Big Branch National Wildlife Refuge in 1994, which now includes eighteen thousand (18,000) acres of pristine wetlands, cypress swamps, and longleaf savanna pine forest located along Bayou Lacombe and the shores of Lake Pontchartrain north of the City of New Orleans.

In 2004, the Parish with the utilization of its zoning ordinances acquired a thirty-two (32) mile abandoned railroad corridor connecting all major cities and communities in the Parish while providing transportation corridors for pedestrians and bicyclists to access the communities. The corridor contains a variety of hardwoods and cypress swamps which will forever be preserved. An important feature was the banking of a portion of said corridor for high-speed rail.

More recently, it purchased over one thousand four hundred forty-two (1,442) acres of undeveloped wetlands, mixed hardwoods, and longleaf Savanna pines in the Mandeville area, which currently serves the dual purpose of acting as drainage basins while preserving those areas for additional recreation and wildlife management. An application has already been submitted for a portion of the said property to be federally designated as a wetlands mitigation bank.

Why is this history important? It is to show the commitment of the Parish to the preservation of its environment, history and local communities while at the

same time looking forward to the future and preparing for it.

St. Tammany Parish recognizes that after Hurricane Katrina and the devastation of New Orleans, the Parishes of St. Bernard, Plaquemines, and Jefferson, we are just one more major hurricane away from an overnight influx of another thirty thousand (30,000) to fifty thousand (50,000) residents fleeing to the high ground of the northern part of the Parish inclusive of the property at issue. We must be prepared with developments such as the one to be built on the land at the center of this controversy.

Not only must the development's infrastructure be ready but also the school systems, police and fire districts, and hospital service districts must be prepared.

Zoning based upon smart growth principles is the foundation of St. Tammany Parish but it is now threatened by the excessive intrusion of the federal government. The federal government is trying to put a square peg in a round hole. It can only be accomplished if the federal carpenter (feds) makes it round. President Grover Cleveland noted: "A government for the people must depend for its success on the intelligence, the morality, the justice, and the interest of the people themselves."

B. Economic Impact

Important issues that were not taken into consideration by the United States Fish and Wildlife Service

are the adverse economic impact on the Parish and the current and future development of the corridor containing the subject property.

The construction of a new four (4) lane Highway 3241, which has been in the planning and funding stages for over twenty-five (25) years, is now a reality with the acquisition of the necessary right of ways. This critical transportation corridor located off of U.S. Interstate 12 (I-12) in Lacombe, Louisiana, will traverse the section of the Parish almost touching the subject property as indicated by the attached map. App. 1.

This will be a critical artery not only in the economic development of the high ground of the northern part of the Parish but also in the evacuation of its citizens and those of the New Orleans area during declared hurricanes.

A review of the attached map reflects the location of three (3) major highways within the Parish's transportation system along with the designated route of Highway 3241. The U.S. Interstate 12 (I-12) and Highway 36 provide east-west traffic flow while Highway 434 and the new Highway 3241 provide north-south flow. Highway 3241 will provide the fastest and most direct route north to the much higher ground of Washington Parish in the event of a hurricane and out of the way of any potential storm surge. These arteries provide an essential part of the routes utilized during evacuation. Traffic flows on such arteries in one (1) direction only, which is commonly called contraflow, is

critical to saving lives with its U.S. Interstate 12 (I-12) connection to the Lake Pontchartrain Causeway and the many residents in the Parishes surrounding St. Tammany.

The Highway 434 corridor is now developed with a new Northshore Community College, a new 911 emergency center, planned governmental complex, hospital, Social Security office, and industrial and residential areas. The further development of said corridor would not be conducive if the habitat designation remains, especially with its required burning.

St. Tammany Parish Government has a diverse funding structure which includes property taxes, impact fees, sales and use taxes, and parcel fees. This tax base must provide funding for the Parish's Judicial and Criminal Justice System, jail, school systems, fire protection districts, public recreation facilities, roads and drainage, public health, hospitals, and care of our elderly and mentally ill.

An average homeowner pays a percentage of the value of their property in taxes per year to support these services. Commercial and industrial structures pay a greater amount per year. However, some pay little or nothing due to their economic situation or status through homestead or use exemptions. Agricultural land, such as the property *sub judice*, currently carries a tax exemption from which the Parish receives nothing except a severance tax when the loblolly pines are harvested.

Although the Parish was maintaining its needs prior to Katrina, it has suffered due to the influx of over thirty thousand (30,000) residents in a short period fleeing to higher ground. It is still recovering.

The non-development of the subject property due to the restrictions that are mandated by the "Critical Habitat" designation is not an economically viable option and was one of the reasons the Parish opposed the designation when it adopted Resolution Council Series No. C-3274 attached hereto as an exhibit. App. 2.

None of these factors were considered by the United States Fish and Wildlife Service in weighing the potential negative economic impact on the Parish or on the safety of the citizens versus the possible relocation of a species of frog that has been non-existent in the designated property for over fifty (50) years.

C. Environmental Impact

The one irrefutable fact in the review is that for the habitat to exist again, the loblolly forest currently on the property *must* be removed and new longleaf pines planted.

Longleaf pines take one hundred (100) to one hundred fifty (150) years to grow to maturity. The burning of underbrush promotes the growth of the longleaf by eliminating other vegetation which may grow higher thereby denying sunlight needed for it to grow.

The burning itself creates not only an environmental and health hazard to the neighboring citizenry

from the thick smoke but safety issues on the nearby transportation corridors, including the new 3241 four (4) lane highway which will practically abut the subject property. The question must be asked if anyone would want to live near such a site other than the gopher frog?

Clearly, the answer is a resounding "No!"

For many years, the preservation of the longleaf pine savanna has created public health and safety issues for the citizens of St. Tammany through the burning of the properties containing same. As an example, a catastrophic wreck with injuries occurred on U.S. Interstate 12 (I-12) in Lacombe, Louisiana, in the early 1990s involving over fifteen (15) vehicles where the smoke was so thick from the burning of the longleaf pine savanna that the responding fire and rescue vehicles had to be led to the victims by rescue workers walking in front of their vehicles guiding the way.

This must never happen again, where the lives of the citizens of St. Tammany are put in jeopardy to potentially save a *non-existent* gopher frog, which currently lives in Mississippi.

CONCLUSION

Regrettably, even if the poor gopher frog is transported to the subject property, it cannot be saved even by the kiss of a beautiful princess as its habitat has been non-existent for over fifty (50) years and cannot

be recreated except by inflicting environmental and safety hazards on St. Tammany Parish and its citizens.

The United States Fish and Wildlife Service's overreaching and intrusive interference in the judicially recognized zoning authority of local governments must not be permitted, and the United States Fish and Wildlife Service's action must be reversed.

Respectfully submitted,

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No. 17-71

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WEYERHAEUSER CO.,
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U.S. FISH & WILDLIFE SERVICE, *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici curiae address the second question only:

Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared before this Court and other federal courts to urge adoption of environmental policies that strike an appropriate balance between environmental safety and economic well-being. *See, e.g. Murray Energy Corp. v. EPA*, No. 15-3751, *pet. dism'd for lack of jurisdiction* (6th Cir., Feb. 28, 2018) (defining "Waters of the United States" under Clean Water Act); *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427 (2014) (challenge to EPA's Clean Air Act "tailoring rule"). In particular, WLF has participated in virtually every major case that has come before this Court regarding the scope of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* *See, e.g., Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing.

study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions, including in *Nat'l Assoc. of Home Builders*. WLF and AEF also filed an *amicus* brief in support of the certiorari petition in this case.

Amici agree with Petitioner that the ESA prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation. *Amici* write separately to focus on the second question raised by Petitioner: whether Congress intended to preclude all judicial review of U.S. Fish and Wildlife Service (FWS) decisions not to exclude areas from an ESA "critical habitat" designation.

As Judge Edith Jones concluded in her dissent from denial of rehearing *en banc* (joined by five other Fifth Circuit judges), the panel's holding that FWS no-exclusion decisions are not subject to judicial review "play[s] havoc with administrative law." Pet. App. 156a. *Amici* are concerned that if that holding is allowed to stand, it will provide federal agencies with unilateral power to make a broad array of regulatory decisions, unchecked by any possibility of judicial review. *Amici* do not believe that the decision below is consistent with this Court's repeated and longstanding application of a "strong presumption" favoring judicial review of administrative action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

STATEMENT OF THE CASE

Once a plant or animal species has been listed as "endangered," the Endangered Species Act generally requires FWS (or, in appropriate cases, the National Oceanic and Atmospheric Administration) to designate "critical habitat" for the species. 16 U.S.C. § 1533(a)(3)(A). Such designations are to be made "in accordance with" criteria set out in § 1533(b). *Ibid.*

Section 1533(b)(2) states that FWS "*shall* designate critical habitat, and make revisions thereto ... on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." (Emphasis added.) Section 1533(b)(2) includes a second sentence that provides additional details regarding how FWS is to exercise its designation authority:

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such areas as critical habitat will result in the extinction of the species concerned.

In 2001, FWS listed the Mississippi gopher frog (a species of frog currently found only in Mississippi) as

an endangered species.[2] In 2011, FWS published a proposed rule that would have designated certain areas in Mississippi (but not elsewhere) as critical habitat for the species. Pet. App. 86a. In response to peer-review comments that the designated areas were insufficient for conservation of the species, FWS amended the proposed rule to include an area in Louisiana (referred to as "Unit 1") within the designation. *Id.* at 87a.

The amended proposed rule noted that FWS had prepared a draft economic analysis (DEA) of the economic impact of its proposed designation. *Designation of Critical Habitat for Mississippi Gopher Frog; Revised Proposed Rule*, 76 Fed. Reg. 59774, 59789 (Sept. 27, 2011). The DEA concluded that the designation of Unit 1 as critical habitat could decrease the value of that property by as much as $36.3 million. *Id.* at 59790. However, the amended proposed rule did not suggest that FWS had taken those costs into account in connection with its proposal to designate Unit 1. To the contrary, FWS stated that it selected sites for designation based on its determination that they were "considered essential for the conservation of the species." *Id.* at 59781. Having selected its proposed sites without considering economic impacts, FWS explained that before issuing a final rule it would consider all of the criteria set out in § 1533(b)(2) in determining whether to exclude any of the proposed sites:

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[2] FWS renamed the species the "dusky gopher frog" in 2012, soon after it first proposed the designation of areas outside of Mississippi as "critical habitat" for the species.

> In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in extinction of the species.

Id. at 59789. In other words, FWS reserved the right to adhere to its proposal to designate Unit 1 as critical habitat even if it ultimately determined that the benefits of non-designation outweighed the benefits of designation. FWS added, without further explanation, "We have not proposed to exclude any areas from critical habitat." *Ibid.*[3]

In its 2012 final rule, FWS continued to include Unit 1 (consisting of 1,544 acres of forested land not

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[3] The procedure employed by FWS in making its critical habitat designation—a two-step process involving a preliminary listing of potential site designations based solely on scientific criteria, followed by an evaluation based on all of the selection criteria (including economic impact) mandated by 16 U.S.C. § 1533(b)(2)—was and is consistent with FWS regulations. *See* 50 C.F.R. § 424.19. However, that two-step procedure is not provided for in § 1533(b)(2) itself. The statute simply requires FWS to take all of the listed criteria into account when considering sites for designation, without specifying the order in which the criteria are to be examined.

currently occupied by the dusky gopher frog) in the area designated as critical habitat. JA99-JA199. Petitioner Weyerhaeuser Co. owns a portion of the land included in Unit 1 and leases the remainder. It (along with other landowners) filed suit in district court in 2013, challenging the "critical habitat" designation. Among their claims: FWS's designation was arbitrary, capricious, and an abuse of discretion—in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A)—because FWS failed to exclude Unit 1 from the designation, even though the costs of inclusion vastly exceeded the benefits (if any) of inclusion.

The district court granted FWS's motion for summary judgment and dismissed the complaint. Pet. App. 78a-122a. The court conceded that the landowners' challenge to FWS's economic analysis was their "most compelling issue," and it labeled "most troubling" FWS's "conclusion that the economic impacts on Unit 1 are not disproportionate." *Id.* at 113a-114a. It ultimately concluded, however, that the ESA required it to defer to FWS's decision to include Unit 1 within the critical habitat designation. *Id.* at 118a.

A divided Fifth Circuit panel affirmed. Pet. App. 1a-77a. The panel majority devoted most of its opinion to explaining its conclusion that FWS acted reasonably in determining that: (1) designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog; and (2) Unit 1 is essential for the conservation of the frog. *Id.* at 15a-32a. It then declined to review Weyerhaeuser's claim that Unit 1 should have been excluded from the critical-habitat designation on the basis of the designation's economic

costs. *Id.* at 32a-36a. It concluded that FWS decisions not to exclude areas from such designation are "decisions 'committed to agency discretion by law'" and thus "are not reviewable in federal court." *Id.* at 33a (quoting 5 U.S.C. § 701(a)(2)). To support its conclusion that Congress intended to preclude judicial review of FWS decisions not to exclude areas on the basis of economic considerations, the panel cited the word "may" in the second sentence of 16 U.S.C. § 1533(b)(2). *Ibid.*[4]

Judge Owen dissented. Pet. App. 48a-77a. She concluded that the ESA precluded inclusion of Unit 1 in the critical-habitat designation because: (1) the area's "biological and physical characteristics will not support a dusky gopher frog population"; and (2) there is no evidence that it will become "essential" to the conservation of the species because "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." *Id.* at 48a. In light of her conclusion, Judge Owen did not address the majority's holding that FWS's no-exclusion determination was not subject to judicial review.

In February 2017, the Fifth Circuit voted 8-6 to deny Weyerhaeuser's petition for rehearing *en banc*. Pet. App. 124a. Judge Jones issued an opinion (joined by five other judges) dissenting from the denial. *Id.* at

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[4] The cited sentence states, in part, that FWS "*may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." § 1533(b)(2) (emphasis added).

124a-162a.

Among the reasons cited by Judge Jones for granting rehearing was her conclusion that "[t]he panel majority play havoc with administrative law by declaring the Service's decision not to exclude Unit 1 non-judicially reviewable." *Id.* at 156a. She faulted the panel for "never recognizing or applying" the "strong presumption favoring judicial review of administrative action," a presumption that "is not easily overcome." *Id.* at 160a. She argued that the panel decision directly conflicts with this Court's decision in *Bennett v. Spear*, that FWS *must* take economic considerations into account in making critical habitat decisions, and that "its ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion." *Id.* at 161a (citing *Bennett*, 520 U.S. at 172). She concluded, "The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action." *Id.* at 162a.

SUMMARY OF ARGUMENT

If the Court decides the first Question Presented in Weyerhaeuser's favor—and holds that Unit 1 was not properly designated as critical habitat because it is neither habitat nor essential to species conservation—the Court could overturn the FWS's critical-habitat rule without ever reaching the second Question Presented. *Amici curiae* nonetheless urge the Court to address the second question regardless how it rules on the first question. Whether FWS decisions not to exclude land from a critical-habitat designation are subject to judicial review is an issue that arises

frequently in the lower courts, and they would benefit greatly from this Court's guidance.

The Fifth Circuit's determination that Congress intended to preclude all review of FWS no-exclusion decisions conflicts sharply with this Court's case law, which creates a strong presumption of judicial review of administrative action. The Fifth Circuit held that Congress barred courts from reviewing an FWS determination to proceed with a "critical habitat" designation in the face of landowner objections that designation would impose unwarranted economic costs. Pet. App. 32a-36a. Any such congressional edict would represent an extraordinary departure from how Congress is normally presumed to legislate. That is so because "[a]bsent [judicial] review, [an agency's] compliance with the law would rest in the [agency's] hands alone." *Mach Mining, LLC v. EEOC*, 135 S Ct. 1645, 1652 (2015). The Court explained:

> We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action.

Id. at 1652-53.

In holding that the ESA barred judicial review of FWS critical-habitat designations, the Fifth Circuit relied on Congress's use of the word "may" rather than "shall" in the second sentence of § 1533(b)(2). That single word cannot possibly bear the weight imposed on

it by FWS and the Fifth Circuit—particularly because the previous sentence in § 1533(b)(2) states that FWS, when making critical-habitat determinations, "shall" take into consideration "the economic impact ... of specifying any particular area as critical habitat." There could have been only one purpose in requiring consideration of economic impact: to prevent an area from being designated as critical habitat when the costs of doing so significantly outweigh the benefits.

FWS may be entitled to leeway in how it goes about weighing costs and benefits. But nothing in the ESA suggests that courts are precluded from reviewing FWS's ultimate determination under an abuse-of-discretion standard. Indeed, the Court in *Bennett* explicitly held that ESA critical-habitat designations were subject to judicial review based on claims that FWS failed to properly consider the "economic impact" of the designations. *Bennett*, 520 U.S. at 172. The decision below cannot be squared with *Bennett*, and the United States's brief opposing certiorari did not contend otherwise.

In concluding that FWS no-exclusion determinations are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the Fifth Circuit relied on this Court's decision in *Heckler v. Cheney*, 470 U.S. 821 (1985). Pet. App. 33a. That reliance was misplaced. *Heckler* held that, in general, the decision by a federal enforcement agency not to bring an enforcement action is not subject to judicial review, primarily because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." 470 U.S. at 831. The Fifth Circuit sought to analogize FWS's decision not to

exclude a particular area from critical habitat to an agency's decision not to bring an enforcement action. That analogy makes little sense. Any FWS decision not to exclude a particular area from critical habitat is, by definition, a decision to *include* the area in the designation—thereby subjecting the area to burdensome government regulation.

Nor can FWS realistically argue that a reviewing court would have no meaningful standard against which to judge FWS's exercise of discretion—many of those standards are set forth in the text of § 1533(b)(2). Indeed, the Service readily concedes that point when the shoe is on the other foot. When an environmental group objects to an FWS decision to *exclude* a particular area from a critical-habitat designation based on a determination that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," 15 U.S.C. § 1533(b)(2), the agency decision is subject to review under an abuse-of-discretion standard. If a reviewing court has meaningful standards against which to judge an FWS decision to exclude a particular area based on a cost-benefit analysis, then it likewise has meaningful standards against which to judge an FWS no-exclusion decision.

The Fifth Circuit's decision to bar judicial review is particularly troubling because the evidence overwhelmingly supports Petitioners' contention that FWS was unable to identify *any* benefits of Unit 1 critical-habitat designation that would offset the admittedly severe economic burdens imposed on

landowners by that designation.[5] FWS's April 6, 2012 "Economic Analysis" did not identify any benefits, other than that land-use restrictions imposed as a result of the designation might preserve open space and thereby "increase adjacent or nearby property values." JA98. That "benefit" does not, of course, do anything to assist the dusky gopher frog or any other endangered species for whose benefit Congress adopted the ESA.

Given § 1533(b)(2)'s mandate that FWS consider economic impact when designating critical habitat, at some point the imbalance between costs and benefits becomes so great that the only rational decision is to exclude the area in question. As the Court recently explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Yet the Fifth Circuit's ruling bars courts from ever reviewing FWS's cost-benefit determinations, no matter how irrational.

The Court should go beyond simply reversing the Fifth Circuit's ruling that FWS's no-exclusion determination is not subject to judicial review. It should also hold that FWS's designation of Unit 1 as

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[5] It is difficult to imagine how the designation could be of any benefit to the dusky gopher frog, given that the frog cannot be introduced into Unit 1 without the permission of landowners (permission they have said they will not grant) and given that (as FWS concedes) Unit 1 is not currently habitable for the dusky gopher frog and could not become habitable unless landowners agreed to substantial alterations of the property.

critical habitat was arbitrary, capricious, and an abuse of discretion, in violation of 5 U.S.C. § 706(2)(A). FWS issued its 2012 final rule while operating under the mistaken belief that § 1533(b)(2) merely requires it to *investigate* economic impact and that it possesses unreviewable discretion to designate an area as critical habitat no matter how much the costs of doing so exceed the benefits. *See, e.g., Revisions to the Regulations for Impact Analyses of Critical Habitat, Final Rule*, 78 Fed. Reg. 53058, 53063 (Aug. 28, 2013). Moreover, the final rule designating Unit 1 as critical habitat, after concluding that designation could cost landowners as much as $34 million, JA189, confined its analysis of costs-versus-benefits to a single sentence: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation." JA 190. That single sentence cannot be deemed reasoned administrative decision-making of the sort demanded by the APA. The Court should vacate the final rule as arbitrary, capricious, and an abuse of discretion. Alternatively, the Court should remand the case to the Fifth Circuit with directions for the appeals court to consider in the first instance whether FWS's designation of Unit 1 as critical habitat complied with the APA.

ARGUMENT

I. NOTHING IN THE ENDANGERED SPECIES ACT OVERCOMES THE "STRONG PRESUMPTION" THAT AGENCY ACTION IS SUBJECT TO JUDICIAL REVIEW

Subject to very limited exceptions, the APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Court has long recognized a "strong presumption" that the actions of federal agencies are subject to judicial review. *Bowen*, 476 U.S. at 670. As the Court recently explained:

> Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a "strong presumption" favoring judicial review of administrative action.

Mach Mining, 135 S. Ct. at 1651 (citations omitted).

"To overcome that presumption," the Court "require[s] 'clear and convincing indications' that Congress meant to foreclose review." *SAS Institute, Inc. v. Iancu*, ___ U.S. ___, 2018 WL 1914661 at *9 (April 24, 2018) (quoting *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016)). When attempting to discern such indications, the Court looks to "specific language, specific legislative history, and inferences of intent drawn from the statute as a whole." *Cuozzo*, 136 S. Ct. at 2140 (citations omitted).

None of those sources contain evidence (let alone

"clear and convincing" evidence) that Congress intended to foreclose review of an FWS decision to designate an area as critical habitat (or, as FWS prefers to phrase the issue, a decision not to exclude an area from a critical-habitat designation). In the absence of such evidence, the Fifth Circuit's decision to deny judicial review must be reversed.

A. The Fifth Circuit Misapplied the "Committed to Agency Discretion" Exception to Judicial Review and Misinterpreted this Court's *Heckler v. Cheney* Decision

The Fifth Circuit did not contend that any provision of the ESA explicitly precludes judicial review of an agency decision to designate ESA critical habitat. Rather, the appeals court based its no-judicial-review determination on 5 U.S.C. § 701(a)(2), which bars review when "agency action is committed to agency discretion by law." Pet. App. 33a. It concluded that Congress precluded review in this instance because there are "no meaningful standards against which to judge the agency's exercise of discretion." *Ibid* (quoting *Heckler*, 470 U.S. at 830).

The appeals court premised its invocation of § 701(a)(2) on a misunderstanding of that statute. *Amici* note initially that the panel neither recognized nor applied the strong presumption favoring judicial review. Proper application of the presumption requires a court to interpret arguably ambiguous statutes as *not* providing agencies with unreviewable discretion. An agency claiming that its actions are unreviewable "bears a heavy burden in attempting to show that

Congress prohibited all judicial review." *Mach Mining*, 135 S. Ct. at 1651. Yet the decision below includes no indication that the panel imposed any evidentiary burden on FWS or even considered interpreting statutory ambiguities in favor of permitting judicial review.

Consideration of a government claim that judicial review is barred under § 701(a)(2) "requires careful examination of the statute on which the claim of agency illegality is based." *Webster v. Doe*, 486 U.S. 592, 600 (1988). In this case, the relevant statute is 16 U.S.C. § 1533(b)(2). That statute includes no indications of review-preclusive intent of the sort included in statutes relied on by the Court in the very few instances in which it has barred judicial review under § 701(a)(2).

For example, in *Webster* the Court held that § 701(a)(2) barred review of an APA claim that the CIA terminated an employee in violation of his statutory rights, citing a statute that empowered the CIA director in his discretion to "terminate the employment of any officer or employee of the Agency *whenever he shall deem such termination necessary or advisable* in the interests of the United States." 50 U.S.C. § 403(c) (1988) (emphasis added).[6] In *Cuozzo*, the Court barred

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[6] The Court concluded that the language of § 403(c) "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review." *Webster*, 486 U.S. at 600. The Court nonetheless held that the language was insufficiently clear to demonstrate that Congress intended to preclude judicial "consideration of colorable constitutional claims" arising out of the discharge. *Id.* at 603.

judicial review of a Patent Office decision to initiate agency review of a patent, invoking 35 U.S.C. § 314(d), which states that "[t]he determination of the Director [of the Patent Office] whether to initiate an *inter partes* review under this section shall be final and nonappealable." 136 S. Ct. at 2139-42.

Section 1533(b)(2) contains no comparable language. That provision cannot be characterized as "exud[ing] deference" to FWS decisions regarding critical-habitat designations. To the contrary, it affirmatively mandates that the agency "shall" base such decisions on specified factors, including "the economic impact" of any designation. Nothing in the statute supports a finding that FWS has overcome the "strong presumption" of reviewability and has met its "heavy burden" of demonstrating a congressional intent to "prohibit[ ] all judicial review" of decisions to designate an area as critical habitat. *Mach Mining*, 135 S. Ct. at 1651.

In holding that Congress intended to preclude judicial review of FWS's designation of Unit 1 as critical habitat for the dusky gopher frog, the Fifth Circuit relied heavily on this Court's *Heckler* decision. That reliance was wholly misplaced. Properly understood, *Heckler* directly conflicts with the decision below. *Heckler* was premised on the understanding that Congress rarely provides guidelines for reviewing the propriety of an agency's decision not to initiate an enforcement action. For that reason, *Heckler* stated, "the presumption is that judicial review is *not* available" for a decision not to initiate enforcement action. 470 U.S. at 831 (emphasis added). The Court explained:

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. ... The reasons for this general unsuitability [for judicial review of agency decisions to refuse enforcement] are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.

Ibid.[7]

The Fifth Circuit sought to analogize FWS's decision not to exclude a particular area from critical habitat to *Heckler*'s analysis of an agency's decision not to bring an enforcement action. Pet. App. 33a. That analogy makes little sense. Any FWS decision not to exclude a particular area from critical habitat is, by definition, a decision to *include* the area in the designation—thereby subjecting the area to burdensome government regulation. As *Heckler* explained, an agency's decision not to initiate an enforcement action does not pose the same threat to liberty or property interests that can arise from the opposite decision and thus presents a less compelling

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[7] *Heckler* held that § 701(a)(2) precluded judicial review of prison inmates' suit to compel the Food and Drug Administration to take enforcement action against several States' use of lethal-injection drugs that had not been approved by FDA as "safe and effective" for human use. *Id.* at 837-38.

case for judicial intervention:

> [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts are often called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

Heckler, 470 U.S. at 832 (emphasis in original).

Section 1533(b)(2) sets forth a list a factors (including "economic impact") that FWS *must* take into account when designating critical habitat. Accordingly, the Fifth Circuit's conclusion that § 1533(b)(2) provides "no meaningful standard against which to judge [FWS's] exercise of discretion" in designating critical habitat, *ibid*, is implausible and conflicts sharply with *Heckler* and other decisions of this Court regarding the meaning of § 701(a)(2). *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (stating that § 701(a)(2) "is a very narrow exception" to APA review and "is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply") (citations omitted).

B. The Second Sentence of Section 1533(b)(2) Is a Limitation on FWS Authority, Not a Grant of Unlimited Discretion

The Fifth Circuit reached its not-reviewable decision by improperly focusing almost exclusively on the second sentence of § 1533(b)(2) to the exclusion of the first sentence. The first sentence includes a laundry list of factors (including "economic impact") that FWS "shall" "tak[e] into consideration" when determining what areas to designate as critical habitat. The second sentence states:

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in extinction of the species concerned.

Relying on the second sentence, the Fifth Circuit held (in agreement with FWS) that "once [FWS] has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court." Pet. App. 33a. That holding is a wholly implausible interpretation of § 1533(b)(2) because it essentially ignores the mandatory language of the provision's first sentence.

The first sentence of § 1533(b)(2) requires any critical-habitat designation to be made only "*after* taking into consideration the economic impact ... of specifying any particular area as critical habitat." (Emphasis added.) Because any critical-habitat designation *must* "tak[e] into consideration" economic impact, it cannot be true (as the Fifth Circuit held) that a decision to designate an area (or, as the Fifth Circuit phrased it, a decision not to exclude the area from designation) is left totally up to FWS's unreviewable discretion regardless of the extent of the economic impact.

The Fifth Circuit's interpretation of the statute might be plausible if FWS's § 1533(b)(2) obligation to "tak[e] into consideration the economic impact" of critical-habitat designations could be satisfied by completing an economic-impact study and then immediately discarding it.[8] But that is not a plausible interpretation of the word "consideration." *See, e.g.*, *Webster's New Collegiate Dictionary* (G. & C. Merriam Co. 1981) ("consideration" defined as "something considered as a ground: REASON" or "a taking into account"). The requirement that FWS must take economic impact into consideration before designating any area as critical habitat requires that consideration of that economic impact must play *some* role in the designation decision. The use of the word "may" in the second sentence of § 1533(b)(2) ("the Secretary *may*

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[8] Indeed, the Fifth Circuit explicitly adopted that very narrow interpretation of the phrase "taking into consideration." *See* Pet. App. 36a (stating that FWS "fulfilled this ['taking into consideration'] requirement by commissioning an economic report by Industrial Economics, Inc.").

exclude any area from critical habitat" based on economic considerations) suggests that FWS is entitled to leeway in how it goes about weighing costs and benefits. But nothing in the ESA suggests that courts are precluded from reviewing FWS's ultimate determination under an abuse-of-discretion standard.

Section 1533(b)(2) does not provide *precise* standards by which courts can review the cost-benefit evaluations mandated by the statute. But at some point the imbalance between costs and benefits becomes so great that the only rational decision is to exclude the area in question. As the Court recently explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Yet the Fifth Circuit's ruling bars courts from ever reviewing FWS's cost-benefit determinations, no matter how irrational.[9]

The Fifth Circuit focused on § 1533(b)(2)'s

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[9] The lower courts are unanimous in concluding that an FWS decision not to designate an area as critical habitat is subject to APA review when the decision is based on economic considerations. *See, e.g., Bear Mountain Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015). Both the Government and the Fifth Circuit are in apparent agreement with that case law. *See, e.g.*, FWS 9th Cir. Br. 40; Pet. App. 35a. That position is inconsistent with their position in this case. If the ESA provides sufficient meaningful standards against which to judge FWS's exercise of discretion in excluding an area from a critical-habitat designation for cost-benefit reasons, then logically there also must be sufficient standards by which a court could judge FWS's decision to *include* the same area.

second sentence as the basis for its holding that FWS possesses unreviewable discretion to designate an area as critical habitat without regard to the economic impact of that designation. But properly understood, the second sentence serves to restrict FWS's discretion, not to broaden it. Its operative language prohibits FWS from relying on economic considerations as a basis for excluding an area from critical habitat, if exclusion "will result in the extinction of the species concerned." The first sentence of § 1533(b)(2)—by requiring FWS to take economic impact into consideration in all its designation decisions—already makes clear that the agency is authorized to exclude areas based on cost-benefit considerations. The second sentence's primary function is to place an "extinction" limitation on that authority.

The appeals court relied on the word "may" in the second sentence of § 1533(b)(2) ("The Secretary *may* exclude an area from critical habitat ...") as its principal basis for holding that an FWS decision *not* to exclude an area from critical habitat is not judicially reviewable. Pet. App. 33a-35a. That reliance is misplaced. Scores of federal statutes use the word "may" in authorizing federal officials to undertake certain actions.[10] Yet *amici* have located *no* federal

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[10] *See, e.g.*, 8 U.S.C. § 1158(b)(1)(A) (immigration officials "may grant asylum to an alien who has applied for asylum in accordance with" procedures established by those officials); 8 U.S.C. § 1226(a)(2) (if an alien has been detained pending completion of removal proceedings, the Attorney General "may release the alien on bond"); 42 U.S.C. § 1988(b) (in a suit alleging violations of specified civil rights statutes, "the court, in its discretion, may allow the prevailing party, other than the United

appellate decisions citing use of the word "may" in a federal statute as the basis for concluding that 5 U.S.C. § 701(a)(2) precludes judicial review of a decision to act affirmatively in a manner contrary to the manner authorized by the statute—with the single exception of cases interpreting 16 U.S.C. § 1533(b)(2). To the contrary, courts routinely hear challenges raising claims under such statutes without questioning their authority to do so. Moreover, when the reviewability issue is raised, courts have uniformly rejected Government assertions that a statute's use of the word "may" indicates that agency action is not judicially reviewable. In rejecting one such challenge, the D.C. Circuit stated:

> When a statute uses a permissive term such as "may" rather than a mandatory term such as "shall," this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show *deference* to the agency's determination. However, such language does not mean the matter is *committed* exclusively to agency discretion.

Dickson v. Secretary of Defense, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (emphasis in original).

States, a reasonable attorney's fee").

C. The Structure and History of the ESA Demonstrate that Congress Did Not Intend to Bar Judicial Review

The Endangered Species Act's structure and history both reinforce the conclusion that Congress did not intend to foreclose judicial review of claims that FWS improperly designated areas as critical habitat for an endangered species.

Congress added 16 U.S.C. § 1533(b)(2) to the ESA in 1978. The new provision, which for the first time required consideration of "economic impact" and the weighing of costs versus benefits in critical-habitat determinations, was enacted as part of the ESA Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978). That statute was adopted in response to the Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978). *TVA* upheld an ESA injunction against completion of the almost-finished Tellico Dam because (some feared) it might eradicate an endangered fish, the snail darter—even though abandonment of the dam would have huge economic consequences.

The *TVA* decision led to a firestorm of congressional criticism, with many Members stating that the ESA had never been intended to restrict land use without regard to whether the cost of those restrictions greatly outweighed their benefits. For example, Senator Jake Garn, a leading proponent of amending the ESA, complained that *TVA* had held that Congress intended "to provide endangered or threatened wildlife and plants the highest possible degree of protection from Federal actions" and thus decreed that "[a]ll other national goals ... must fall in

the face of a threat to an endangered species." Committee on Environment & Public Works, 97th Congress, *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1979, and 1980* (Cong. Res. Service eds., 1982) at 1102. Senator Garn charged that "[t]hat interpretation is ... patent nonsense, and it is not the interpretation put upon the act by the Congress in passing it." *Ibid.* *See* Damien Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas from Critical Habitat Should Be Reviewable under the APA*, 47 Envtl. L. Rep. 10352, 10354-55 (2017).

Regulations adopted by the Department of Interior prior to 1978 had very broadly defined the characteristic of "critical habitat" for an endangered or threatened species. Section 2 of the 1978 amendments adopted a more restrictive definition. In particular, the amendment clarified—in a provision now codified at 16 U.S.C. § 1532(5)(C)—that as a general rule, a species's designated "critical habitat" should not include the entirety of the area in which the species might thrive: "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." The 1978 amendments also adopted a provision—codified at 16 U.S.C. § 1533(b)(2) and discussed at length above—that established the criteria for determining which of the areas in which the species might thrive should be designated as critical habitat.

Citing these provisions, legal commentators have universally understood the ESA Amendments of 1978 as an attempt by Congress to reverse the perceived excesses of *TVA v. Hill* and to ensure that federal

agencies did not make critical-habitat designations until after considering all likely economic consequences, including possible creation of obstacles to land development. *See, e.g.*, Amy Sinden, *The Economics of Endangered Species, Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 148 (2004). As Rep. John Murphy, a principal sponsor of the amendments explained:

> The Conference Report includes the House provision mandating the Secretary to consider the economic impact of designating critical habitat for any species. The Secretary is authorized to alter the critical habitat designation based on this economic evaluation. *This provision is the most significant provision in the entire bill.*

124 Cong. Rec. H13579 (daily ed. Oct. 14, 1978) (statement of Rep. Murphy) (emphasis added).

The Fifth Circuit held that Congress, when it mandated that FWS take economic impact into consideration in connection with critical-habitat designations, simultaneously precluded courts from reviewing an FWS decision to include a disputed area within that designation—no matter how economically irrational the decision might be. That holding cannot be squared with the structure and history of the 1978 ESA Amendments. Given the amendments' widely understood purposes—to legislatively overrule *TVA v. Hill* and to ensure that the goal of preserving endangered species would no longer be pursued to the

exclusion of other goals such as economic development—the strong presumption in favor of judicial reviewability has not been overcome. A Congress intent on reining in environmental excesses would have had no reason to grant FWS free rein to act as it pleased.

D. The Fifth Circuit's Interpretation of Section 1533(b)(2) Conflicts with this Court's Decision in *Bennett*

In concluding that 5 U.S.C. § 701(a)(2) bars judicial review of FWS's no-exclusion decision, the Fifth Circuit made no mention of this Court's decision in *Bennett v. Spears*. Pet. App. 32a-36a. Yet *Bennett* addressed this precise issue and concluded that FWS economic-impact decisions were judicially reviewable under the APA.

Indeed, Judge Jones's dissent from denial of Fifth Circuit rehearing *en banc* highlighted the clear conflict between *Bennett* and the panel decision. Pet. App. 160a-161a. Neither the panel nor the judges voting to deny rehearing challenged her conclusion that *Bennett*'s holding authorizes judicial review under the circumstances of this case. In his brief opposing the certiorari petition, the Solicitor General did not dispute that the decision below conflicts with *Bennett*. Opp. Br. 30. The Solicitor General argued that review was unwarranted, characterizing *Bennett*'s statements regarding the availability of judicial review as "passing dictum." *Ibid.* But the brief neither challenged the accuracy of those statements nor stated that later Court decisions called into question their continued viability.

At issue in *Bennett* was an FWS Biological Opinion that concluded: (1) long-term operation of the Klamath Irrigation Project was likely to jeopardize two endangered species of fish; and (2) a reasonable and prudent measure to avoid that jeopardy was to require the maintenance of minimum water levels on certain reservoirs (thereby reducing the amount of water available for irrigation). The plaintiffs sought judicial review of the Biological Opinion, asserting that: (1) it implicitly designated critical habitat for the endangered fish; and (2) that designation violated § 1533(b)(2) because it was undertaken without "tak[ing] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." *Bennett*, 520 U.S. at 172.

The government sought dismissal of the claim by asserting that, under § 1533(b)(2), FWS possessed unreviewable discretion in deciding whether to exclude particular areas from a critical-habitat designation based on economic-impact considerations. The Court rejected that assertion, stating, "the terms of § 1533(b)(2) are plainly those of obligation rather than discretion." *Ibid.* The Court stated that use of the word "may" in the second sentence of § 1533(b)(2) did not alter its conclusion that courts were authorized to review—under an abuse of discretion standard—FWS's ultimate decision regarding whether to exclude particular areas from a critical-habitat designation based on cost-benefit considerations. *Ibid.*

This case arises in a posture somewhat different from that in *Bennett*, in which the Government contested the plaintiffs' *prudential standing* to challenge a critical-habitat designation. The Court

reversed a Ninth Circuit holding that the plaintiffs lacked prudential standing to allege that the designation violated § 1533(b)(2), and it held that each of the plaintiffs' claims was reviewable under either the ESA citizen-suit provisions or the APA. *Id.* at 179. The Government did not argue that 5 U.S.C. § 701(a)(2) precluded judicial review, and the Court did not address that issue. But even if *Bennett*'s statement that an FWS critical-habitat determination "is reviewable ... for abuse of discretion" is properly categorized as *dicta*, it is based on a well-reasoned analysis of § 1533(b)(2) and ought to be followed in this case. Certainly, nothing in the Fifth Circuit's decision suggests otherwise; it failed address *Bennett*'s reviewability discussion.

II. JUDICIAL REVIEW IS PARTICULARLY WARRANTED WHEN, AS HERE, FWS HAS FAILED TO IDENTIFY *ANY* BENEFITS DERIVED FROM A CRITICAL-HABITAT DESIGNATION

The Fifth Circuit's decision to bar judicial review is particularly troubling because the evidence overwhelmingly supports Weyerhaeuser's contention that FWS was unable to identify *any* benefits of Unit 1 critical-habitat designation that would offset the admittedly severe economic burdens imposed on landowners by that designation. Given the factual record, the Court may wish to consider declaring that FWS abused its discretion when it issued the final rule, and ordering that the case be remanded to the agency for further proceedings.

Amici note initially that no party contests that the designation of Unit 1 as critical habitat imposes a

sizeable economic burden on Weyerhaeuser and the other private parties who own land included within Unit 1. FWS's final rule designating Unit 1 as critical habitat acknowledged that designation could cost landowners as much as $34 million. JA189.

Moreover, that cost estimate fails to account for economic burdens that the designation will impose on those other than the landowners. For example, the *amicus curiae* brief of St. Tammany Parish Government catalogues the numerous economic hardships that designating Unit 1 as critical habitat will have on the local government. Those hardships include: (1) interference with Parish plans to develop the area along the corridor of Highway 3241, which is now under construction; (2) loss of tax revenues if the projected development of land within Unit 1 does not materialize; and (3) environmental and health hazards that would arise if (as would be necessary in order to make Unit 1 habitable for the dusky gopher frog) fires are regularly set to remove the loblolly forest currently on the property. St. Tammany Br. 5-9. FWS's refusal to take into consideration those economic and environmental impacts is an apparent violation of its statutory duty under § 1533(b)(2); yet if the Fifth Circuit's no-review holding is upheld, administrative errors of that sort will go uncorrected.

In contrast, there is *no* evidence that the dusky gopher frog will benefit from the designation. *Amici* note initially that Unit 1 is privately owned land and that dusky gopher frogs have no means of reaching the land on their own. FWS has no right to trespass on the property for the purpose of introducing frogs, and there is no evidence that the landowners contemplate

granting FWS permission to do so. Unless FWS purchases the property from the current owners (something it has never offered to do), dusky gopher frogs will never reach Unit 1 and thus will never benefit from a critical-habitat designation.

More importantly, the evidence indicates that if dusky gopher frogs ever reached Unit 1, they could not survive there. As FWS acknowledges, the dusky gopher frog needs three things for its habitat. Two of those essential features are absent from Unit 1: (1) upland, open canopy forests close to its breeding ponds, where the frog lives when it is not breeding; and (2) upland habitat—featuring an open canopy and abundant groundcover produced by frequent fires—connecting its breeding and non-breeding grounds. Those features will continue to be absent unless the owners of Unit 1 voluntarily agree to substantial modification of their property in order to add them. But "the only evidence in the record is that the owners do not plan to do so and there is no evidence that economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1." Pet. App. 76a-77a.

Indeed, the authors of FWS's April 6, 2012 Economic Analysis conceded that they could not identify *any* "direct benefits" to the dusky gopher frog from designating Unit 1 as critical habitat:

> Quantification and monetization of species conservation benefits would require information on the incremental change in the probability of gopher frog conservation that is expected to result

> from the designation. No studies exist that provide such information for this species.

JA95. Instead, the study confined its discussion to consideration of "ancillary benefits" of designation. Even there, the only potential "ancillary benefits" identified by the study were those "related to the avoidance of development of Unit 1." JA97. And the study did not conclude any such benefits actually exist; rather, it simply speculated (contrary to the conclusion of St. Tammany Parish officials) that: (1) "[o]pen space or decreased density in development resulting from gopher frog conservation may increase adjacent or nearby property values"; (2) [s]ocial welfare gains may be associated with enhanced aesthetic quality of habitat"; and (3) "[d]ecreased development may lead to protection and improvement of water quality and preservation of natural habitat for other species." JA97-98.

Of course, similar, unsubstantiated speculation could be advanced in support of *any* critical-habitat designation. But the bottom line is that none of the speculated benefits of deterring development has anything to do with the purpose of designating critical-habitat designation: to ensure the survival of an endangered species. In the absence of *any* evidence that the designation of Unit 1 would benefit the dusky gopher frog, the relevant "benefits" of FWS's designation are precisely zero, and the ratio of costs to benefits is infinite.

Given § 1533(b)(2)'s mandate that FWS consider economic impact when designating critical habitat, at

some point the imbalance between costs and benefits becomes so great that the only rational decision is to exclude the area in question. As the Court recently explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. at 2707. Yet the Fifth Circuit's ruling bars courts from ever reviewing FWS's cost-benefit determinations that favor designation, no matter how irrational.

Moreover, given that FWS proceeded with its Unit 1 designation despite a record demonstrating an infinite cost-benefit ratio and failed to consider all relevant economic impacts, *amici* urge the Court to reach the merits of Weyerhaeuser's § 1533(b)(2) claim and hold that the designation was arbitrary, capricious, and an abuse of discretion, in violation of 5 U.S.C. § 706(a)(2).

To demonstrate its compliance with § 1533(b)(2)'s directive that it designate critical habit only *after* taking into consideration the economic impact of doing so, FWS must at a minimum "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). FWS has failed to meet that burden. Instead of providing a "satisfactory explanation" for its decision, its entire analysis of cost-benefit comparisons consisted of a single sentence: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation." JA 190. The Court should reverse with

directions that the case be remanded to FWS to provide the agency with an opportunity to provide a satisfactory explanation for its decision.

FWS failure to provide a reasoned decision was likely a product of its mistaken belief that it was entitled to unreviewable discretion to ignore economic impacts identified by its economic analyses and to designate critical habitat without regard to those impacts. As demonstrated above, FWS lacks such unreviewable discretion. Accordingly, if FWS really possesses a rational basis for making a critical habitat designation that cannot possibly benefit the dusky gopher frog, it ought to be permitted an opportunity to explain what that basis is. Alternatively, the Court should remand the case to the Fifth Circuit with directions for the appeals court to consider in the first instance whether FWS abused its discretion when it designated Unit 1 as critical habitat.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF ON THE MERITS IN SUPPORT OF PETITIONER ON BEHALF OF THE WYOMING STOCK GROWERS ASSOCIATION; WYOMING ASSOCIATION OF CONSERVATION DISTRICTS; WYOMING FARM BUREAU FEDERATION; WYOMING WOOL GROWERS ASSOCIATION; NEW MEXICO CATTLE GROWERS ASSOCIATION; NEW MEXICO WOOL GROWERS, INC.; ARIZONA/NEW MEXICO COALITION OF COUNTIES FOR STABLE ECONOMIC GROWTH; AND PROGRESSIVE PATHWAYS, LLC

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QUESTION PRESENTED

Whether the United States Fish and Wildlife Service's decision not to exclude certain private property from a critical habitat designation, after taking into consideration the economic impact of the designation, is a discretionary agency decision that is reviewable by the Court.

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AMICUS CURIAE BRIEF OF THE WYOMING STOCK GROWERS ASSOCIATION; WYOMING ASSOCIATION OF CONSERVATION DISTRICTS; WYOMING FARM BUREAU FEDERATION; WYOMING WOOL GROWERS ASSOCIATION; NEW MEXICO CATTLE GROWERS ASSOCIATION; NEW MEXICO WOOL GROWERS, INC.; ARIZONA/NEW MEXICO COALITION OF COUNTIES FOR STABLE ECONOMIC GROWTH; AND PROGRESSIVE PATHWAYS, LLC IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Wyoming Stock Growers Association; Wyoming Association of Conservation Districts; Wyoming Farm Bureau Federation; Wyoming Wool Growers Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; Arizona/New Mexico Coalition of Counties for Stable Economic Growth; and Progressive Pathways, LLC respectfully submits this *amicus curiae* brief, on behalf of themselves and their members, in support of Petitioner.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* confirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, their members, or their counsel have made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties. *See* S.Ct.R. 37.3(a).

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The mission of the Wyoming Stock Growers Association (WSGA) is to serve the livestock business and families of Wyoming by protecting their economic, legislative, regulatory, judicial, environmental, custom, and cultural interests. The WSGA advocates for the protection of private property rights from over burdensome regulatory interference. The Association maintains a legal fund to enable it to initiate, defend or support litigation on critical issues with the potential to have a major impact on its members' ranching enterprises including their private property rights.

The Wyoming Association of Conservation Districts (WACD) provides leadership for the conservation of Wyoming's soil and water resources, promotes the control of soil erosion, promotes and protects the quality of Wyoming's waters, promotes the wise use of Wyoming's water and all other natural resources, preserves and enhances wildlife habitat, protects the tax base and promotes the health, safety and general welfare of the citizens of the State of Wyoming through a responsible conservation ethic. The WACD advocates for the protection of property rights and land and water resources through local solutions to environmental concerns.

The Wyoming Farm Bureau Federation (WFBF) is a general agriculture organization with more than 2,600 member families. Its members work together to develop agricultural resources, policy, programs and

services to enhance the rural lifestyle of Wyoming. This organization provides a means by which farmers and ranchers work together for the benefit of the agriculture industry including the use of private property on which its members depend. Its policies cover a broad range of issues including the Endangered Species Act.

The Wyoming Wool Growers Association (WWGA) is an association of ranchers on both private land and federal leased land whose goal is to protect, preserve, and enhance the lamb and wool industry and the ranching community and lifestyle. The WWGA has been an active partner with the State of Wyoming and its citizens in caring for, enhancing, and adding value to the renewable resources of the state, including those on private lands.

The New Mexico Cattle Growers Association was established in 1914 to assist livestock producers in the State of New Mexico. The association has members in all 33 of New Mexico's counties as well as in 19 other states. The purpose of the Association is to advance and protect the cattle industry of New Mexico; work toward solutions of industry problems; promote the well-being of the industry; provide an official and united voice on issues of importance to the cattle producers and feeders; and create and maintain an economic climate that will provide members of the Association with the opportunity to obtain optimum returns on their investment.

The New Mexico Wool Growers, Inc. is the state of New Mexico's oldest livestock trade organization. The

Association lobbies in the interests of the sheep industry, including the food and fiber industry in the state of New Mexico. The New Mexico Wool Growers also provides information, programs and advocacy services. The organization is active in promoting agriculture and ranching and works on legislative and regulatory issues that affect the industry.

The Arizona/New Mexico Coalition of Counties for Stable Economic Growth (Coalition) is a coalition of local governments in the states of Arizona and New Mexico as well as agriculture and industry organizations, private individuals and businesses located in both states. The Coalition's mission includes protecting the rural economies of the member local governments, maintaining and increasing the tax base, protecting private property rights, protecting and enhancing endangered plants and animal species at the same time as reducing the negative effects of the Endangered Species Act restrictions on federal, state and private lands.

Progressive Pathways, LLC is an entity formed by private property owners in Wyoming with the continuing purpose of educating its members and other interested publics regarding pipelines, condemnation and landowners' rights, especially as these issues affect private property owners. The LLC also works to take whatever steps are necessary to protect local residents (including schools, farmsteads, and areas of concentrated populations) to address environmental damage and to help protect and improve landowners' rights

through legislation, public education, the courts and any other forum that will further this purpose.

STATEMENT OF THE CASE

Two of the most fundamental rights given to us by our Founding Fathers is the right to use and own private property. James Madison in Federalist 54 wrote "Government is instituted no less for the protection of the property than of the persons of individuals." Federalist No. 54 (James Madison). The Founding Fathers further acknowledged this right by creating two constitutional amendments protecting the right to private property in the forms of the Fifth and Fourteenth Amendments. Under these constitutional amendments private property cannot be taken without due process of law. U.S. Const., amend. V; U.S. Const., amend. XIV. One of the most important forms of due process of law when property is being taken by administrative actions is the right for judicial review. *Greene v. McElroy*, 360 U.S. 474, 493 (1959).

In this case, the United States Fish and Wildlife Service (FWS) designated two tracts of land as critical habitat under the Endangered Species Act (ESA). One tract contained all of the primary constituent elements necessary for the survival of the dusky gopher frog including a population of the species. Additionally the FWS designated the Petitioner's private property as critical habitat, although, as admitted by the FWS, as it currently sits, Petitioner's parcel is uninhabitable by the

endangered frog and contains none of the endangered species themselves. 77 Fed. Reg. 35,129 (June 12, 2012). When conducting the required economic analysis for designating critical habitat, the FWS determined that the designation of the Petitioner's tract could result in up to $34 million in economic impacts due to lost development opportunity. *Id.* at 23,140. Further, the FWS could not show any discernible benefit for designating the Petitioner's private land as critical habitat. *See Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 848 F.3d 635, 654 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc). The ESA requires that the FWS consider the economic impact of designating critical habitat, and if the benefits of excluding a parcel from the critical habitat designation outweigh the benefits of including the parcel as critical habitat, then the Secretary may exclude the land from a critical habitat designation. 16 U.S.C. § 1533(b)(2). That analysis was not done in this case and the Respondents argue that the decision to not complete the required analysis is not reviewable by the Court.

Despite the great disparity between the potential economic harm and any benefits associated with designating the currently uninhabitable Petitioner's land as critical habitat, the FWS persisted on designating the habitat and further refused to exclude the Petitioner's land as critical habitat. Both the United States District Court for the Eastern District of Louisiana and on a split decision, the 5th Circuit Court of Appeals ruled in favor of the FWS stating that species habitability is not a requirement for critical habitat, and

further, that the court cannot review the FWS's decision not to designate critical habitat because the decision is a discretionary decision. Sustaining precedent that would allow the FWS to designate currently uninhabitable land as critical habitat, and further, not allowing judicial review of decisions not to exclude certain tracts of private land from a critical habitat designation should not stand. The *amici curiae* represent thousands of agricultural landowners owning tens of thousands of acres of land in the West. Many of these landowners have property that is similarly situated to the Petitioner's land in that their land could have only one of the physical and biological features deemed necessary for a listed species' habitat but be designated as "critical habitat" anyway despite the harm to the landowner. A ruling in favor of the FWS would expose their land to similar unchallengeable critical habitat designations.

Finally, it is important to note that despite Respondents' claims to the contrary, critical habitat designations on private land can fundamentally harm the property rights and economic use associated with the land. Section 7 of the ESA requires that all federal agencies must consult with the FWS whenever performing discretionary activities that could result in destruction or adverse modification of critical habitat (*see Conservation Council for Hawai'i v. Babbitt*, 2 F.Supp.2d 1280, 1286 (D. Haw. 1998)) *and* if the FWS determines that such adverse modification will occur, then the federal agency must either discontinue the action, ask for an exemption, or provide mitigation in order to replace the harmed critical habitat. Section 7

has evolved to reach nearly all agency activities, including minor and relatively unrelated activities such as FEMA granting flood insurance, the Farmer's Home Administration providing a loan guarantee for upgrading a water pipeline, or the U.S. Rural Electrification Administration funding an electrical substation. *See Florida Key Deer v. Stickney*, 864 F.Supp. 1222 (S.D. Fla. 1994); *see also National Wildlife Federation v. FEMA*, 345 F.Supp.2d 1151 (W.D. Wash. 2004). ESA Section 7 consultation was required in all of these cases because of the potential that the project would encourage new development. *Florida Key Deer* at 1235. In *Sierra Club v. Glickman*, 145 F.3d 606, 619 (5th Cir. 1998), the court required the farmers to undergo ESA Section 7 consultation regarding the impact of irrigation on critical habitat prior to receiving farm subsidy payments. In an industry where merely every action requires acquiescence from the federal government, even on private land, the designation of critical habitat on private land could stop many otherwise lawful uses of private property.

SUMMARY OF THE ARGUMENT

Amici Curiae urge this Court to rule in favor of the Petitioner and hold that the court may review the FWS's decision not to exclude certain lands as critical habitat pursuant to 16 U.S.C. § 1533(b)(1)(2). This Court has stated that agency actions are presumptively judicially reviewable. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The presumption

is rebuttable by the federal agency when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct. *Id.* at 1651. However, the agency bears a "heavy burden" in attempting to show that Congress "prohibited all judicial review" of the agency's compliance with a legislative mandate. *Id.* Based on precedent set by this Court regarding other claims by agencies of unreviewable actions, the language set forth by Congress in the Endangered Species Act does not "prohibit all judicial review," and thus falls short of overcoming the strong presumption in favor of judicial review.

The Fifth Circuit's ruling that the FWS's decision not to exclude certain private property from a critical habitat designation is unreviewable also contradicts this Court's decision in *Bennett v. Spear*. That case held that the agency's ultimate decision regarding critical habitat designation could, at the very least, be reviewable for an "abuse of discretion." 520 U.S. 154, 172 (1997).

Finally, ruling that the FWS's decision is unreviewable abdicates the Court's traditional role of ensuring that the mandates of Congress are enforced. Doing so would be counter to Congress' intent when it ordered the designation of critical habitat because it would take the teeth away from Congress' mandate that the FWS take into consideration the economic impact of specifying any particular area as critical habitat. Further, such a ruling would create no legal recourse for property owners whose property would

suffer severe and perhaps unjustified economic harm due to inclusion in a critical habitat designation.

ARGUMENT

I. THE LANGUAGE IN THE ENDANGERED SPECIES ACT DOES NOT OVERCOME THE PRESUMPTION FOR JUDICIAL REVIEW.

Agency actions are presumptively judicially reviewable. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015) (holding that a court may review whether the EEOC has satisfied its statutory obligation to attempt conciliation with an employer, as a prerequisite to a Title VII action, despite fact that the statute grants the EEOC "broad leeway" in determining how to attempt conciliation). The presumption is rebuttable by the federal agency when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct. *Id.* at 1651. This must be shown by "'clear and convincing' indications drawn from 'specific language,' 'specific legislative history,' and 'inferences of intent drawn from the statutory scheme as a whole' that Congress intended to bar review." *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) (ruling that judicial review was proper despite language within the statute stating "the determination . . . under this section . . . shall be final and non-appealable"). One way Congress shows its intent to prohibit agency review is when "there is no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470

U.S. 821, 830 (1985). However, the agency bears a "heavy burden" in attempting to show that Congress "prohibited all judicial review" of the agency's compliance with a legislative mandate. *Mach Mining, LLC*, 135 S. Ct. at 1653.

In the present case, the ESA requires that the FWS *shall* consider the economic impact of a critical habitat designation. 16 U.S.C. § 1533(b)(2). (Emphasis added). When a statute distinguishes between "may" and "shall," it is generally clear that "shall" imposes a mandatory duty; therefore the FWS has a mandatory duty to make economic considerations when designating critical habitat. *Kingdomware Technologies, Inc. v. U.S.*, 136 S. Ct. 1969, 1977 (2016); *see also Bennett v. Spear*, 520 U.S. 154 (1997) (ruling that the FWS must mandatorily make economic considerations when designating critical habitat). Upon considering the economic impact of a critical habitat designation, the FWS, "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. . . ." 16 U.S.C. § 1533(b)(2). The majority in the Fifth Circuit adopted the FWS's argument that once the Service fulfills its statutory obligation to "consider" economic impacts, a decision not to exclude an area is discretionary, and is thus not reviewable in court. *Markle Interests, LLC v. U.S. Fish and Wildlife Service*, 827 F.3d 452, 474 (5th Cir. 2016). The Fifth Circuit based this decision on *Heckler* in which this Court ruled that, "If no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is

impossible to evaluate agency action for 'abuse of discretion.'" 470 U.S. 821 (1985). Since § 1533(b)(2) states that the agency "may" exclude an area from critical habitat, the Fifth Circuit concluded that the decision was completely discretionary, and thus unreviewable by the court.

There are several reasons why the Fifth Circuit's majority conclusion is incorrect. First, the discretionary action in *Heckler* is distinguishable from the agency action set forth in excluding private property from a critical habitat designation. Second, the Administrative Procedures Act (APA) does not prohibit judicial review of all discretionary decision making. Third, there are judicially manageable standards available for judging whether the FWS's decision not to exclude the property as critical habitat was an abuse of discretion. Finally, the FWS never overcame the "heavy burden" it must show in order to overcome the presumption of judicial review. *See Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 848 F.3d at 654 (Jones, J., dissenting from denial of rehearing en banc).

A. *Heckler v. Chaney* is distinguishable from the present case.

The Fifth Circuit majority based its ruling that the FWS's decision not to exclude Petitioner's property from the critical habitat designation on the precedent set forth in *Heckler v. Chaney*. Pet. App. at 35a. However, *Heckler* is distinguishable from the present case

and *Heckler*'s rationale does not extend to the type of decision made by the FWS here.

In *Heckler*, this Court reviewed the extent to which a court may review the Food and Drug Administration's decision not to take enforcement actions requested by respondents. 470 U.S. at 838. The Court concluded that an agency's decision not to enforce a statutory provision regarding an enforcement action is unreviewable. *Id.* The Court based its decision on: (1) not wanting courts to intrude upon prosecutorial decision making; (2) infringing upon agency discretion over how to expend government resources; or (3) improperly inserting the judiciary into an agency's enforcement prioritization. *Id.* at 831-832. Further, the Court rationalized that an agency's decision not to take an enforcement action is a decision "not to exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832.

In contrast, a decision not to exclude an area of habitat as "critical" is essentially a decision to enforce the ESA's rules regarding critical habitat. *See Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 848 F.3d 635, 654 n.21 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc). In deciding to not exclude an area from the designation of critical habitat (particularly one that does not contain the primary constituent elements for the species' survival), the FWS is not making a decision to do no action, *but rather is making an affirmative decision to take action to designate the particular area as "critical habitat" and enforce the*

requirements of the ESA against that property owner. Because of this distinct difference, preventing the FWS's decision from judicial review does not protect any of the interests which with the *Heckler* Court was concerned. When declining to exclude areas from critical habitat, the FWS is not (1) acting as a prosecutor determining whether to prosecute a private citizen; (2) deciding how to use its resources because critical habitat designation does not involve any resource allocation, but is rather a decision to place extra regulatory restrictions on a piece of land; or (3) prioritizing enforcement. Instead, the decision not to exclude private land as critical habitat looks closer to a decision by the agency to "exercise its coercive power over an individual's liberty or property rights." *Heckler*, 470 U.S. at 832. Decisions that have the ability to infringe upon an individual's liberty or property rights are the very types of decisions the courts are supposed to review and protect from unlawful infringement. *Heckler*, 470 U.S. at 832. Because of these distinguishable differences, the concerns in *Heckler* do not apply in this case and the Court should allow judicial review of the decision not to exclude the Petitioner's property from the critical habitat designation.

B. The APA does not prohibit judicial review of all discretionary decisions.

Despite the lower court's ruling to the contrary, the APA does not prohibit judicial review of all discretionary decisions. In fact, the APA's text commands the opposite. Title 5 U.S.C. § 706(2)(A) states, "The

reviewing court shall . . . hold unlawful and set aside agency action . . . found to be an abuse of *discretion* . . ." 5 U.S.C. § 706(2)(A). (Emphasis added). If a court cannot review discretionary agency decisions, then how can a court review for "abuse of discretion?" Thus, the APA text expressly allows for review of discretionary final decisions that are "abusive discretion."

Further, ruling that a statute that uses permissive phrasing in granting an agency power as unreviewable would create precedent that could open up a floodgate of bureaucratic decisions that even though irrational and not ascribable to agency expertise, yet the impacted regulated public would have no relief. Traditionally, permissive phrasing in a statute indicates that Congress has given the agency discretion. But discretion is not necessarily a barrier to judicial review. *E.g.*, *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) (decisions under statute providing that agency "may correct any military record" when it "considers it necessary" "are subject to judicial review"); *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401-1402 & n.7 (D.C. Cir. 1995) ("may" suggests that "Congress intends to confer some discretion on the agency," not that "the matter is committed exclusively to agency discretion"); *Beno v. Shalala*, 30 F.3d 1057, 1066-1067 (9th Cir. 1994) ("the mere fact that a statute contains discretionary language does not make agency action unreviewable"). The fact that Congress gives an agency broad latitude does not mean that it has "left *everything*" to the agency. *Mach Mining*, 135 S. Ct. at 1652. A ruling that is contingent upon the rationale that the use of the

word "may" precludes judicial review would be devastating to modern day administrative law. Thus, despite the Endangered Species Act's use of "may," the decision may still be judicially reviewed under the context of abuse of discretion.

C. There are judicially manageable standards by which to measure the decision not to exclude private property from a critical habitat designation.

Despite the lower court's assertion to the contrary, there are judicially manageable standards by which to measure the FWS's decision not to exclude land from a critical habitat designation. These standards can be found in the ESA, the APA, and the Constitution.

The ESA delivers the first judicially manageable standard upon which to measure the Service's decision. The ESA states that the FWS "may exclude any area from critical habitat if he determines that the benefits of such *exclusion outweigh the benefits of specifying such area as part of the critical habitat.*"[1] 16

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[1] As a note, the statute continues on to state that the FWS cannot exclude land from a critical habitat determination if the Service "determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). However, this section is not at issue in the present case because as has been stated several times, the land at issue is not currently habitable by the endangered frog. 77 Fed. Reg. at 35,129. Further, there are currently no dusky gopher frogs on the Petitioner's land, thus exclusion of the land from a critical habitat designation cannot result in the extinction of the species.

U.S.C. § 1533(b)(2). (Emphasis added). In other words, Congress specifically required the FWS to perform some type of "balancing test" or analysis to determine whether exclusion is proper. Thus, a court could review a decision to determine whether the Service actually conducted the balancing test or analysis when it made a determination not to exclude certain property from a critical habitat determination. This review would look similar to the review this Court has already mandated to review the Endangered Species Act, requiring that the agency must actually consider the economic effects of designating critical habitat. *See Bennett v. Spear*, 520 U.S. 154 (1997).

In the present case there is a question as to whether the Service actually conducted a good faith attempt at a balancing test or analysis. *See Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 848 F.3d 635, 653 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc). In conducting the economic analysis of designating the Petitioner's land as critical habitat, the FWS concluded that the designation could cost up to $34 million in economic harm to the landowners due to lost development opportunity. *Id.* When discussing the benefits of the designation, the economic benefit the FWS concluded was that individuals could possibly pay to protect the endangered frogs. *Id.* The other benefits the FWS listed were abstract items, such as "open space" and "decreased development." Finally, the FWS's statement regarding the direct benefits

of designating the land as critical habitat was "best expressed in biological terms." *Id.* However, the Service failed to quantify or express what those benefits are in light of the concrete cost associated with the designation when it concluded "that the economic analysis did not identify any disproportionate costs that are likely to result from the designation." 77 Fed. Reg. at 35,141. Thus, the court could perform a judicial review as to whether the FWS balancing of the abstract benefits of designating property that does not have the necessary primary constituent elements for survival of the species and has no species living on the property versus the loss of the use of the private property and whether that determination was "an abuse of discretion" under 5 U.S.C. § 706(a)(2).

The APA also provides grounds for judicial review of the decision not to exclude private property from a critical habitat designation. This Court has traditionally prohibited agencies from making inconsistent decisions based on agency policy, stating that such decisions could be an arbitrary and capricious change from agency practice. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). In the present case, Congress has specifically directed the agency to consider the economic consequence of designating an area as critical habitat, and has specifically given the agency the power to exclude areas that are disproportionately costly to designate. Further, this Court has expressed in *Michigan v. EPA* that "no regulation is appropriate if it does more harm than good," and when deciding whether to regulate,

agencies have long treated cost as a centrally relevant factor in determining whether to regulate. 135 S. Ct. 2699, 2707 (2015). The reality is that a critical habitat designation puts intense regulation upon the private property owners. ESA Section 7 consultation is required for any action that may cause jeopardy to the continued existence of any listed species "or result in the destruction or adverse modification of [critical] habitat of such species." *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1051 (9th Cir. 2013). As explained above, a critical habitat designation puts the property squarely within the purview of Section 7 of the ESA, which requires that all discretionary actions undertaken by any government entity cannot adversely modify the critical habitat. 16 U.S.C. § 1536. Federal district and circuit courts have required ESA Section 7 consultation on issues impacting private landowners such as authorizing Federal Emergency Management Agency mapping and determinations related to the granting of flood insurance, the Farmer's Home Administration providing a loan guarantee for upgrading a water pipeline and the U.S. Rural Electrification Administration funding an electrical substation. *Florida Key Deer v. Stickney*, 864 F.Supp. 1222 (S.D. Fla. 1994) (holding that the mapping and issuing of flood insurance encourages private property development, thus ESA Section 7 consultation was required).[3] Additionally, in *Sierra Club v. Glickman*, 145 F.3d 606, 619 (5th Cir. 1998), the Fifth Circuit required

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[3] In this case, the property owners have made it known that they are looking at development of this property in the future.

farmers to undergo ESA Section 7 consultation regarding the impact of irrigation on their private lands that were designated as critical habitat prior to receiving farm subsidy payments.

In the present case, the FWS determined that the ephemeral ponds on the landowner's property are critical habitat despite the fact that those ponds are currently uninhabitable by the frogs. 77 Fed. Reg. at 35,129. At a minimum, under these precedents, if the landowners ever request FEMA insurance or any type of subsidy for any development activity that could jeopardize the ephemeral ponds, or request a permit from the Army Corps of Engineers to fill the ephemerals ponds, these requests will be denied unless some other mitigation occurs at the landowners' cost. Thus, with this backdrop of Congress' mandate that the FWS weigh the benefits of excluding critical habitat, and traditional requirement that no regulation should create more harm than good, the landowners should have a right, on remand, to judicial review. Thus the court should examine whether the FWS abused its discretion when the agency determined that the benefits of including the land as critical habitat even with the $34 million cost did not outweigh the currently unquantifiable benefits "best expressed in biological terms."

Finally, the Constitution also provides a standard of review of all agency actions not specifically excluded, regardless as to whether a statute itself lends the decision to judicial review. *See Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (holding that the Constitution itself provides a standard for judicial review even when the

statute itself does not). Decisions that are irrational violate due process and must be allowed for judicial review. *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In looking at whether an agency decision is rational, the agency must articulate a rational connection between the facts found and the decision made. *Id.* Such review of agency decisions is necessary to protect the public from decisions that would be otherwise illegal, such as deciding not to exclude a parcel because of the race or religion of its owner, or a decision not to exclude critical habitat due to the speech of the landowner. Since the FWS made a conclusion that there were no disproportionate costs associated with the inclusion of the Petitioner's property as critical habitat, despite the strong evidence to the contrary without articulating any rationale as to why the decision was made in light of the facts, the decision is irrational and should be subject to judicial review.

D. The U.S. Fish and Wildlife Service failed to overcome the "heavy burden" it must show in order to overcome the presumption of judicial review.

Agency actions are presumptively judicially reviewable. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The presumption is rebuttable when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct. *Id.* at 1651. This can be shown by "'clear and convincing' indications drawn from 'specific language,' 'specific

legislative history,' and 'inferences of intent drawn from the statutory scheme as a whole' that Congress intended to bar review." *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016). However, the agency bears a "heavy burden" in attempting to show that Congress "prohibited all judicial review" of the agency's compliance with a legislative mandate. *Mach Mining, LLC*, 135 S. Ct. at 1653.

In the present case, the Fifth Circuit presumed unreviewability, instead of reviewability, essentially placing the burden of showing reviewability on the Petitioner. That is a reversal of the burden of proof required by this Court. *See Markle*, 848 F.3d at 653 (Jones, J., dissenting from denial of rehearing en banc). In doing so the Fifth Circuit ignored this Court's precedent of placing the "heavy burden" upon the FWS to prove that Congress prohibited all judicial review of its decision not to exclude uninhabitable private property as critical habitat. *Mach Mining, LLC*, 135 S. Ct. at 1653.

II. THE LOWER COURT'S DECISION CONFLICTS WITH *BENNETT V. SPEAR*.

By ruling that there is no judicial review of the FWS's decision, the lower court directly ruled contrary to this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997).

In *Bennett*, the Court held that the FWS's consideration of economic impact was mandatory. In that case, similar to the present case, the FWS based its

argument in favor of discretion on the permissive language of the Endangered Species Act that stating that the Service *may* exclude critical habitat. *Id.* at 172. This Court rejected that argument stating:

> *the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion* does not alter the categorical requirement that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'

Id. (Emphasis added). As applied to this case, this requirement means that the court has the jurisdiction to determine if the FWS legitimately considered the economic impacts of designating Petitioner's land as critical despite the fact that it did not contain the primary constituent elements for eligibility as balanced with the tremendous cost of the designation. It cannot be understated that in this case, the FWS recognized that the Petitioner's property has to have man-induced physical alterations to be habitat for the species. 77 Fed. Reg. at 35,118, 35,123. The court should have the jurisdiction to determine whether speculative action in the future (the FWS "hopes" to work with private landowners to convert their land into suitable habitat) balanced with the huge economic loss to the landowners is an abuse of agency discretion.

In reviewing for abuse of discretion, agency action is set aside if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered

an explanation for its decision that runs counter to the evidence before the agency," or is otherwise "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This standard requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" In the present case, reviewing the ultimate decision would require the court to look at the agency's rationale for its decision making, including how the FWS applied its economic analysis to its decision to include landowners' property in the critical habitat decision. Ultimately, the majority of the Fifth Circuit failed to review the decision under an abuse of discretion standard, despite the fact that the evidence indicates a possibility of such abuse. On the other side of the analysis, the FWS failed to articulate any substantial benefits that outweigh those costs due to the fact that the land cannot currently be occupied by the dusky gopher frog and cannot sustain the species in the future without an affirmative act to convert the property to suitable critical habitat. Such contradictions should be reviewable in court because they run "counter to the evidence before the agency" and "[are] so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43.

III. THE RULING THAT THE U.S. FISH AND WILDLIFE SERVICE'S DECISION IS UNREVIEWABLE IS COUNTER TO CONGRESS' INTENT WHEN IT MANDATED THE FWS TO DESIGNATE CRITICAL HABITAT.

Finally, the Court should overturn the lower court ruling that the decision not to exclude Petitioner's property as "critical habitat" is unreviewable because such precedent would abdicate the Court's role of being guardians of Congressional intent in the face of agency decisions.

As stated above, this Court has determined that judicial challenge to critical habitat decisions can be sustained. *Bennett v. Spear*, 520 U.S. 154 (1997). The legislative history behind including economic considerations in making critical habitat designations originates from the infamous *Tennessee Valley Authority v. Hill* (*TVA*). In *TVA*, the Court ruled that the Endangered Species Act cannot make economic considerations when deciding whether to list a species as endangered. Further the Court ruled that the construction of a dam being built by the Tennessee Valley Authority should be discontinued despite the fact that Congress spent over $100 million on the structure. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). In response, Congress amended the Endangered Species Act to require economic considerations when designating critical habitat. The 1978 House Report regarding the amendment to the Endangered Species Act indicates that, after *TVA*, Congress added Section 4(b)(2) to "avoid conflicts" with "Federal activities at an

early stage." H.R. Rep. No. 95-1625, at 13, 16 (1978). Thus, the designation of critical habitat is the only opportunity to prevent "needless economic dislocation" in the early stage of federal activities. *Bennett*, 520 U.S. at 176.

Congress' mandate that economic consequences must be considered and the FWS's ability to exclude critical habitat must be read together. Together, they make "economic consequences" an "explicit concern of the ESA" and advance Congress' "primary" "objective" of "avoid[ing] needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-177. Without judicial review of the agency's decision not to designate uninhabitable private property as critical habitat, the Congressional mandate that the FWS take economic considerations in designating critical habitat is rendered toothless because the economic analysis could give all indications that the land in this case should be excluded, but the Service could still capriciously refuse to exclude critical habitat with impunity.

Such a decision would run contrary to the majority in *Mach Mining*. Without judicial review, "compliance with the law would rest in the [Service's] hands alone." *Mach Mining*, 135 S. Ct. at 1652. The Court "need not doubt the [Service's] trustworthiness, or its fidelity to law, to shy away from that result." *Id.* "We need only know – and know that Congress knows – that legal lapses and violations occur, and especially so when they have no consequence." *Id.* at 1652-1653. Thus, by

refusing to review the decision not to exclude certain land designations as critical habitat, the Court would essentially make Congress' mandate of economic consideration useless. Therefore, judicial review must be afforded to the decision not to exclude property within a critical habitat designation.

CONCLUSION

Although the FWS will try to argue that the designation of critical habitat has no "real impact" on a landowner's use of private property, that is simply not the case. In this day, it is hard to imagine any type of business based upon the ownership and use of private property that, at some point, does not require some federal permit or authorization. Certainly the *amici* and their members cannot imagine a scenario where a federal authorization is not required which would trigger the requirements of ESA Section 7 consultation. Section 7 consultation is required once critical habitat is designated based on the prohibition of "adverse modification" as a form of species "take" prohibited by Section 9 of the ESA. 16 U.S.C. § 1540. This case is not about whether the FWS can affirmatively designate critical habitat under the requirements of the ESA, but rather it is about whether the federal courts have jurisdiction to review that substantive decision. Given that there is no type of administrative review for a critical habitat designation, the FWS should not be granted the unfettered discretion to designate any property, anywhere without at least a minimal review

of the court for abuse of discretion. As Justice Marshall stated in *Overton Park*, "Section 701 of the Administrative Procedure Act, 5 U.S.C. s 701 (1964 ed., Supp. V), provides that the action of 'each authority of the Government of the United States,' . . . is subject to judicial review except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.'" That case goes on to state that there is only a very narrow exception for "action committed to agency discretion" and that is "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated by Califano v. Sanders*, 430 U.S.

99, 97 (1977). That exception does not apply in this case and the decisions of the lower courts should be reversed.

Respectfully submitted,

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